***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

ORIGINAL

# 75-7037

# United States Court of Appeals

**For the Second Circuit.**

AUDREY WEINER, AS ADMINISTRATRIX OF THE ESTATE OF JULIE A. WEINER, Deceased,

Plaintiff-Appellant-Appellee,

-v-

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE, JANE STONE, GREYHOUND BUS LINES, INC., and RONALD BROWN,

Defendants-Appellees-Appellants.

*Appeal from the United States District Court for the Eastern District of New York*

# Appellant's Appendix

**VOLUME II—Pages 369-653**

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UNITED STATES COURT OF APPEALS
FILED
AUG 12 1975

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(3)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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ALAN VANCE WEINER

-v- 71-C-1177

BARBARA WEINER VOLUME II

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United States Court House
Brooklyn, New York

October 1, 1974
10:10 A.M.

B e f o r e :

HONORABLE JUDGE JOHN F. DOOLING, JR., U.S.D.J.
and a Jury

IRA RUBINSTEIN
ACTING OFFICIAL COURT REPORTER

APPEARANCES:

United States Attorney
for the Eastern District of New York

BY: ARTHUR SPATT, ESQUIRE
Attorney for Plaintiff

SAMUEL LEVITT, ESQUIRE
Attorney for Defendants

JAMES CAMERON, ESQUIRE
Attorny for Defendant

STANLEY ZAWACKI, ESQUIRE
Attorny for Defendant

(Weiner versus Weiner, before Judge Dooling, October 1, 1974.)

(Whereupon the witness RONALD M. BROWN, who, having previously been sworn, resumes the stand and testifies upon his oath as follows:)

(Whereupon the jury enters the courtroom at 10:10 A.M. and the following proceedings are resumed within their presence:)

CROSS-EXAMINATION

BY MR. CAMERON: (CONTINUED)

Q Mr. Brown, with regard to this particular accident, I take it you were in Court when you heard Mrs. Weiner testify she has no recollection as far as this accident; is that correct?

A Not in this Court.

Q I believe you were present though when Mr. Weiner testified yesterday the only recollection that he has of this accident was that he recalls the car going to the right towards the snowbank or guard rail - that he saw the Greyhound bus momentarily before the accident; did you hear that?

A Yes, sir.

Q Now I take it that you are familiar with portions of your testimony that were given at the examination

marks on that road under those conditions?

before trial at the referee's hearing?

A Yes, sir.

Q And with regard to your hearing before the referee that was taken back on November the 3rd, 1971, do you recall being asked the question and giving this answer. This is on Page 9, your Honor:

"Question, Were you aware of that impact either by your vehicle or the Weiner vehicle with the Stone vehicle?

"Answer, I have no idea."

Do you recall being asked that question and giving that answer?

A Somewhat.

Q Mr. Brown, I ask you the same question today, would your answer be the same today, that you don't recall any impact with the Stone vehicle, the third car?

A That's correct.

Q And with regard to your examination before trial taken back on August the 3rd, 1972, do you recall being asked these questions and giving these answers on Page 18, line 19 - I'm sorry, line 16:

"Question, When this first vehicle that you saw coming over the hill struck the guard rail, where was the second vehicle with respect to the first vehicle?

"Answer, When I noticed the second vehicle

it was behind the first vehicle.

"Question, Approximately how far?

"Answer, Again I couldn't say."

Do you recall being asked those questions and giving those answers concerning the Stone motor vehicle?

A Yes, sir.

Q And if I ask those questions today would your answer be the same?

A It would be the same.

Q On Page 19, line 8:

"Question, After the accident is that the first time that you saw this other car again, this car, this third car - we'll call it?

"Answer, I know the third car was involved in the accident when I was in the hospital."

Do you recall giving that question and giving that answer?

A Yes, sir.

Q Would it be fair to say that in your position, the driver's seat on the bus, that at no time did you ever see any contact between your bus or the Weiner vehicle with the Stone vehicle?

A That's correct.

Q And it wasn't until after the accident that you heard from someone that the Stone vehicle was involved in

this accident?

A That's correct.

Q Mr. Brown, with regard to this accident, I believe you testified to some extent yesterday that you were also injured; is that correct?

A That's correct.

Q Would you tell the jury what injuries you sustained?

A The series of skis were driven through the bus and one of them drove my leg underneath the seat and done a lot of damage to the lower part of my leg.

Q Sustain any fractures?

A The bone was badly damaged; whether it was busted or not, I don't know.

Q Was that the extent of your injury?

A Yes, sir.

MR. CAMERON: Thank you, Mr. Brown. No further questions, your Honor.

DIRECT-EXAMINATION

BY MR. LEVITT:

Q You were out of work for about six months, were you?

MR. SPATT: I object to that, if your Honor please.

A Yes.

MR. LEVITT: Indicative of the nature of the jury because he --

THE COURT: Well I thought the real point of this examination was simply to indicate that he didn't have any head injuries.

MR. LEVITT: He was injured though still, your Honor.

THE COURT: And was - there were other injuries too; is that right?

MR. LEVITT: Whatever he got kept him out. May I ask a question?

Q (By Mr. Levitt) They kept you out of work for six months?

MR. SPATT: I object to it.

THE COURT: It really doesn't make a bit of difference whether the question is asked or answered. If you wish to ask it, go ahead.

Q (By Mr. Levitt) Were you out of work for about six months as a result of your injury?

A Little bit better.

THE COURT: By reason of the injury to your legs?

THE WITNESS: Yes, sir.

Q (By Mr. Levitt) May I ask you, you in the

course of your employment at Greyhound, you have taken out many chartered parties to various places?

A Yes, sir.

Q Places that you haven't been before, that is part of your duties?

A Yes, sir.

Q Now at this time, you said it wasn't snowing and you didn't have your windshield wiper on. Did you have any other mechanism on?

A Defrosters.

Q Have any air condition on?

A Yes, sir.

Q And by the way, were you coming from the ski resort; is that Killington, am I right?

A Killington, yes, sir.

Q And had you left Killington at the time that you were supposed to originally or did you leave it earlier or later?

A We left earlier, sir.

Q You left earlier than you were supposed to?

A Yes.

Q What was the reason for that?

A The snowstorm involved up there at that time and I checked out weather reports and more or less, I was advised by the group they would rather leave earlier than

wait until the original time.

Q You anticipated the trip would take you longer?

A Yes, sir.

Q Now did you have your lights on, I think you said you had your lights on?

A Yes, sir.

Q And how many gears do you have in your car?

A Four gears.

Q And in what gear were you traveling when you were on Route 149?

A Third gear.

Q At what speed were you traveling as you were going along Route 149?

A Approximately 30 to 35.

Q Now, I didn't understand one thing. You were being questioned by the attorney for Mr. Weiner. Was there any - any question about the fact you were driving your bus for almost four years?

THE COURT: He was given three years nine months and he said that it was a little more.

MR. LEVITT: All right.

Q (By Mr. Levitt) Essentially that is the time you had been driving the bus; isn't that so?

A Approximately, yes, sir.

Q Are you married?

A Yes, sir.

Q Have children?

A Yes, sir.

Q How many?

A Two.

MR. ZAWACKI: May I ask what this has to do --

THE COURT: It is very circumstantial, he may show it.

MR. LEVITT: Thank you, Judge.

Q (By Mr. Levitt) And Mr. Dombeck was a neighbor of yours?

A Yes, sir.

Q A few blocks away?

A Yes, sir.

Q You had known him for many years, had you?

A Approximately six years.

Q And was he on that bus with the permission of the chartered party?

A That's correct.

Q Now you asked - you were asked some questions about the accident report that you signed. Did you make that accident report out? Did you write that out?

A No, sir, I did not.

Q Where was it written out?

A It was written out in the hospital room.

Q Was the whole report written out at the time or part of it?

A At this time I don't -- I couldn't remember if the portions of it were done or not.

Q Did you know -- you say it was the next day; am I right?

A Yes, sir it was.

Q And where were you at the time the information was obtained. The time the report was filled in?

A I was in bed.

Q And at that time did you know that Barbara Weiner lived at 300 Parsippany Road?

A No, sir.

Q Did you know the various names of the people involved in the accident at that time?

A No, sir.

Q You have here in the report some referrences was made to the fact that you said location on the road was dangerous to the top of the hill east then it says when you noticed the danger was the car at the top of the hill?

A When I first noticed the car the car was at the top of the hill.

Q And you said in the report that, "Location on roadway of impact you were half on the shoulder, half on driveway."

Is that true at the time of the impact, you were half on the shoulder and half on the driving lane?

A Roughly, yes.

Q I would like to ask you this also as part of that report on explanatory of that report and the facts contained therein. You were asked to describe to the man who came down from Greyhound how this accident happened?

A Yes, sir.

Q Did you describe it to him?

A I belive so, yes, sir.

Q Did he write out in his report the explanation of the matters checked and how the accident happened? Did he write that out and describe the accident fully?

A I give him a statement, yes, sir.

Q He wrote it out?

A Yes, sir.

Q Is that what you told him, "Driving west on 149, observed two cars coming down the hill"?

MR. ZAWACKI: Please hold it. I object to this reading from this document, your Honor.

MR. LEVITT: I do it only in view of an explanation. In view of the fact they read part of the notations on the docket, I respectfully submit I am entitled to read anything that explains or clarifies.

THE COURT: I would think so. In other words,

it may reveal internal consistency, inconsistency. But in any event since he did sign the whole document, we know the circumstances of its preparation. He may show all of the things which may bear on any one thing that has been shown.

MR. ZAWACKI: Your Honor, since in essence that long narrative is going to come into evidence now by the fact --

THE COURT: I don't know how long it is.

MR. ZAWACKI: About 10, 12 lines, I assume there will be part of the record. May I have just one question on voir dire of this witness concerning the report in effect it is coming into evidence, I think.

THE COURT: If it is really going to turn out to be one, Mr. Zawacki, the floor is yours.

Q (By Mr. Zawacki) Mr. Brown, bearing in mind what your lawyer here said, you didn't know the name of Mrs. Weiner or where she lived. Is that a correct statement or an accurate statement that such things as names of drivers, where they live, what kind of car they were driving, was information that somehow your company got from who knows where? But the things on the report concerning the manner in which the accident happened is what you told the man at the hospital? Is that fair?

A Yes, I told the gentleman.

Q In other words the way the accident happened came from you, who owns the cars, where they live, well, that was his concern?

A Yes.

MR. ZAWACKI: All right, I have no objection to it being read.

Q (By Mr. Levitt) And the number of feet you have in here in the report, that stuff that came from the man who you saw at the hospital, the exact number of feet --

A Yes, sir.

Q -- did you tell him, "Driving west -- " this is on Page 2 of the report that I gave you.

"Driving west on 149, observed two cars coming down hill. First of two cars hit guard rails on right side of road. As soon as I noticed the danger I applied brakes. They were applied all the time from the time she hit the guard rails until the time of impact. She lost control of the car and it came across into the west lane. At this time I done everything possible to get the bus as far as possible over to the right. The car hit the bus head-on. At the time of impact I had almost completely stopped the bus. At no time did the bus give or did I ever lose complete control. There was just no place to go."

Is that what you told the man?

A Yes, sir.

MR. LEVITT: Thank you.

CROSS-EXAMINATION

BY MR. SPATT:

Q Mr. Brown, I listened carefully for the narrative of how the accident happened and I don't see anything here about skidding in that narrative; is that correct, Mr. Brown?

A That's correct, sir.

Q Nor skidding on the part of your bus or on the Weiner car; is that correct?

A That's correct, sir.

Q You did say the Weiner car hit the guard rail, bounced off it and lost control of the car; is that what you said?

A Yes.

Q When you got on - if you'll forgive me, sir, would you tell me that number of the route that you got onto, 149, I forget that. I think you testified - I asked you whether you went through Fordham Village, you remember that, then you said I remember - what did you say?

A I was traveling on Route 4.

THE COURT: 4.

THE WITNESS: Yes, sir.

Q (By Mr. Spatt) Route 4 onto 149?

A Yes, sir.

Q And going that way would you have had to pass the Village of Queen Anne?

A Fort Anne.

Q Fort Anne, I'm sorry.

A I don't remember, sir.

Q All right. Now, would it be fair to say this Greyhound representative who came to see you in the hospital the day after the accident and filled out these three sheets of paper with the names of addresses of people with a diagram, with distances of hundred and four feet, and all of that, would it be fair to say that you didn't give him that information; is that correct?

A That's correct, sir.

Q Now, would it also be fair to say that he got this information from the police department? If you know.

MR. ZAWACKI: I object to this.

THE COURT: He might have had a tape measure himself, et cetera, et cetera, et cetera. I think that's pretty speculative.

Q (By Mr. Spatt) Well, did this representative of the Greyhound bus go to the scene of the accident if you know, before he went to see you or did he come to see you directly or did he go to the police department if you remember

THE COURT: If he knew, you see. Did he know?

Q (By Mr. Spatt) Do you know where he went from - what he talked to you about?

A I believe he was obtaining some of the information before he talked to me.

Q From where?

A That I have no idea, sir.

Q Well, when he came up to see you and said, Mr. Cranige, he said how are you feeling Mr. Brown and so forth, he didn't say to you I had just come from the police department where I got the official report or I spoke to the police officer. He didn't say that to you?

A I don't remember that, sir.

Q Did you see any tire marks in the snow as you were sitting in the bus after the accident when you looked out in the road? Did you see any tire marks? Do you know what tire marks are?

A Yes.

Q You mean distinctive tire marks?

Q (By Mr. Spatt) Of a vehicle showing a vehicle had passed over the road. Did you see tire marks?

A This I previously - to the accident --

Q No, when you sat there in the bus.

A I don't remember.

Q Well could there -- did you see any skid marks on that road under those conditions?

A I don't remember, sir.

Q Okay. Now do you know what a skid mark is, yes or no?

A Yes, sir.

Q Do you know that a skid mark is a mark usually dark that's left by a tire after the brake has been depressed completely and after the brake has taken effect and the wheel has locked?

THE COURT: Do you understand? Answer.

Q (By Mr. Spatt) And with the wheel locked the car continues to go with the wheel locked and leaves marks. Do you know if that skid marks, Mr. Brown.

MR. ZAWACKI: That's objected to, your Honor.

THE COURT: No, I think if Counsel can agree on what a skid mark is, probably everyone on the jury has his own idea of what a skid mark is.

MR. ZAWACKI: Right.

THE COURT: Might not all agree, that's the only kind of skid mark there can be with one indicating that the wheels are locked or so slowed down that there has been a drag of the rubber surface over this surface.

Q (By Mr. Spatt) I am talking, Mr. Brown, about a skid mark, not skidding. We call -- but I am talking

about skid marks now and I say if you don't know it -- do you know that a skid mark is made by a car after the brake has been depressed, the wheels are locked. Stopped. And the car continues forward and leaves with a screeching noise, that we have all heard, leaves those marks on the road. Do you know if that skid mark.--

MR. LEVITT: I'm going to object to the form.

THE COURT: See, that's only one skid mark. The objection to the form of the question will have to be sustained.

Q (By Mr. Spatt) Can I see the original report?

MR. LEVITT: Oh, sure.

Q (By Mr. Spatt) In effect, as you were looking at the Weiner car and you were looking at it all during this occurrence, didn't this car in effect bounce off the guard rail and come across to your side of the road?

A That's the statement I made, yes, sir.

Q Isn't that what happened?

A Yes, sir

Q And you were asked by Mr. Zawacki about the heavy slush on the road, do you remember those questions?

A Yes, sir.

Q Was there any heavy slush on the roadway?

MR. ZAWACKI: No I object. I don't think

I will have it this afternoon.



I said "heavy slush."

THE COURT: Well, whatever. You might ask him then what he observed of the slush conditions and where he saw slush, if he saw it and can he recall it

Q (By Mr. Spatt) Now would you describe the conditions of the slush on the roadway leading up to and the point of impact?

THE COURT: If it was on the roadway.

Q (By Mr. Spatt) If it was on the roadway.

A Well, the roadway itself was wet and slushy. Has been driven on before, kind of a dirty wet snow. The amount of it I could not tell you.

Q But you testified on two occasions that the roadway looked as if it had been plowed; is that correct?

A Yes, sir.

Q Now when an automobile is making a curve in the road to the left as the Weiner car was doing, would an automobile that's making a curve to the left, is there a natural pull of the car in any direction when you are making a curve to the left? Do you know what I mean by that, you are a driver?

A Yes, sir. This would be, somewhat.

Q Where would that pull be, the natural pull, I think it is the centrifugal force.

THE COURT: Centripetal.

Q (By Mr. Spatt) Right, centripetal, your Honor.

If your car is going - forget the snow, regular road, making a curve to the left, where would the pull of the car be?

A Be to the right.

MR. SPATT: No further questions, your Honor.

MR. ZAWACKI: I am not going to start it all over again, your Honor, but since that report has been referred to so much, I would like to offer the original of it into evidence. There are two pages of it.

THE COURT: We had been talking about more pages than two here.

MR. LEVITT: There are three pages.

THE COURT: Would you want to show your copy?

MR. LEVITT: Yes, sir.

MR. ZAWACKI: Talking about the diagram. I offer the diagram plus the two pages.

MR. SPATT: I object to it on the grounds there are other statements in here which are hearsay which are not correct and therefore I would have to go through it with your Honor before that. Certainly there are portions that we have testified to. I have no objection to it. Things such as speed, miles per

THE COURT: Well I think as indicated

hour, which of course is not binding on this Court and jury because it is on the diagram for example, things of that nature.

MR. LEVITT: I wanted to offer it before and they objected. No, I have no objection to it being offered.

MR. SPATT: I have no objection to the parts that had been testified to, going into evidence.

THE COURT: That's all going to be offered, I think.

MR. SPATT: That includes everything that every lawyer talked about.

THE COURT: What purpose that does - if Counsel can agree on the parts they think are not sufficiently related to the evidence, then we can put in that part. Now, there was some stuff there not related to the evidence, but which is either completely neutral or completely not the subject of disagreement.

MR. CAMERON: Your Honor I object to the diagram because based on his testimony he doesn't know where or he doesn't recall any impact, then the Stone vehicle and the other vehicle, so he couldn't possibly draw a diagram knowing of the position.

THE COURT: I don't think there would be any

argument because he hasn't been asked whether he prepared the diagram or whether indeed it was attached to the report at the time that they signed it.

MR. SPATT: In addition there is a lot of data on this that I know nothing about nor does anybody else nor do I think knows anything else which is on this thing. So I think my own opinion is --

THE COURT: Well all right, then we can discuss it separately.

MR. SPATT: Yes, sir.

THE COURT: Now does anybody want to ask Mr. Brown before he is excused whether he did prepare the diagram, whether the diagram was attached to the report at the time he signed it.

MR. SPATT: Yes, sir.

RECROSS-EXAMINATION

BY MR. SPATT:

Q Mr. Brown, this diagram that is attached to this report at least I have a photostatic copy of it, was that prepared by the gentleman that came to see you or did you prepare that?

A That was prepared by the representative.

Q Do you remember if a diagram was attached to the report when you signed it? The reason I ask you that is --

THE COURT: Just ask him.

Q (By Mr. Spatt) Was it attached to the report, do you remember that?

A I don't think it was, sir.

MR. SPATT: I have no further questions of the witness, your Honor.

MR. LEVITT: I have no further questions, your Honor.

THE COURT: All right, you may step down, Mr. Brown.

MR. SPATT: Your Honor, may I read the examination before trial of Janet Stone I had.

THE COURT: Of Mrs. Stone?

MR. SPATT: Yes, your Honor, it is very short. This is the examination of Mrs. Janet Stone, the wife of Barry Stone whose examination I read yesterday. And was taken at the same time and place which was September 24, 1972 at the Office of Riley & Riley.

"Janet Stone, first having been duly sworn by a Notary Republic of the State of New York, testifies as follows: Examination by Mr. Baughman.

"Question, What is your name?

"Answer, Janet M. Stone.

"Question, Where do you live?

"Answer, We are moving to 39 Stirling Court, Burlington, Vermont.

"Question, Mrs. Stone, you were present just now when we asked your husband all of the questions concerning the accident; is that correct?

"Answer, Yes.

"Question, You were present in the car at the time of the accident; is that correct?

"Answer, Yes.

"Question, Did you see the accident?

"Answer, No.

"Question, Were you sleeping at the time?

"Answer, No.

"Question, What were you doing at the time of the accident?

"Answer, Watching the road.

"Question, Did you see the contact between the Weiner car and the bus?

"Answer, No.

"Question, Where were you looking at that time?

"Answer, I would gather I was looking straight ahead. I think we may have passed the point and I would have been looking straight ahead or to the side.

"Question, You didn't see that contact?

"Answer, No.

"Question, Did you see the point at which the Weiner car apparently -- this is according to your husband's testimony -- went off the road to the right and came in contact with the snowbank?

"Answer, Yes.

"Question, You saw that?

"Answer, Yes.

"Question, Can you tell us whether the Weiner car made contact with the guard rail that was there? Did it appear that way to you?

"Answer, It appeared it made contact with the snowbank and perhaps the guard rail as well, but one could not differentiate between the two.

"Question, Did you then see the Weiner car go off the left across the center of the road?

"Answer, Yes.

"Question, You didn't see it come in contact with the bus?

"Answer, No.

"Question, At any time before the accident did you see the bus coming towards you?

"Answer, No.

"Question, You never saw the bus until after

the accident?

"Answer, I saw the bus as a picture of a scene. At the same time I seen the car, the Weiner car go into the snowbank, I saw the presence of the bus and realized undoubtedly something was going to happen, but I could not locate the bus, I couldn't tell you where it was, how fast it was going.

"Question, Any definitive answer. You couldn't make any estimate speed of the bus approaching, any point where the bus happened--;is that correct?

"Answer, No, I just know it was a bus."

The next question is objected to. There is a Motion to Strike the next answer as not responsive, your Honor. Maybe you want to make a ruling on that. Can I show it to you, Judge?

MR. ZAWACKI: Why don't you read the responsive answer.

THE COURT: Maybe Counsel will have no objection.

MR. LEVITT: I don't know what he is saying. I would like him to continue on Page 52, line 25.

THE COURT: There was a question asked.

MR. SPATT: But there is an objection to the question.

THE COURT: Then there was colloquy, then an

answer was given. Is there an objection to the question and the answer? I am asking you?

MR. ZAWACKI: Yes.

THE COURT: The question is the one at Line 19.

MR. SPATT: The question is on Page 52, the bottom, extreme bottom of the page.

THE COURT: 25.

MR. SPATT: Line 25, your Honor.

MR. LEVITT: I would like that read if your Honor please.

THE COURT: No, that may be read in view of the rest of the answer through 15.

MR. SPATT: Read the whole thing, Judge.

THE COURT: Read the colloquy out if you will.

MR. SPATT: Okay.

THE COURT: That woman reading the answer at Line 4, the renewed answer at Line 27 and question 14 and the answer at 15.

Thank you, Mr. Zawacki.

MR. SPATT: That is the question on Page 52, bottom of the page, Line 25.

"Question, Could you tell us whether it appeared to you that the bus had swerved at this point

before the contact took placed?"

MR. LEVITT: If your Honor please -- I'm sorry. I'm sorry, I was reading.

MR. SPATT: "Answer, My impression was the bus was definitely on its own side of the road."

Skipping to Line 11:

"Answer, I did not answer your question, shall I answer that question?

"Question, Yes.

"Answer, No, it did not appear that the bus had swerved.

"Question, Did it appear to you whether the bus had slowed down in any manner before the accident occurred?

"Answer, I have no way of knowing, I don't know.

"Question, You heard your husband's testimony concerning the point of contact between your car and the Weiner car?

"Answer, Yes.

"Question, You say that that is where the point of contact was, your left side and rear?

"Answer, I can't visually attest to that, I mean, I did not see our car get hit, but I know that is where we were hit on the basis of looking at the

car after the accident.

"Question, Right before the accident took place were you talking to your husband?

"Answer, I was probably talking at him. He was driving. I would assume that is what I was doing. I may have been doing a crossword puzzle, looking out the window, chatting.

"Question, You don't know exactly what you were doing?

"Answer, I was probably talking at him as he was driving.

"Question, Was it dark or was it light, to your best recollection?

"Answer, It was light, but dusk was coming on.

"Question, How was the visibility as you were proceeding; was it good?

"Answer, As I was aware of it, when you are not driving you don't pay attention to such things as I was aware of it, it was quite good at the time of the accident.

"Question, After the accident, did you have any conversation with any of the drivers or passengers in any of the other cars?

"Answer, No, I spoke to no one.

caused what damage would be asking the impossible.



"Question, Did you speak to a policeman?

"Answer, I spoke to a policeman, but not at the accident. He spoke to my husband about it.

"Examination by Mr. Zawacki:

"Question, Were any cars ahead of the Weiner car, say half mile before the accident?

"Answer, No. Ahead of the Weiner car?

"Question, Yes, ahead of the Weiner car.

"Answer, To my knowledge, no.

"Question, How about ahead of the bus, coming in the other direction, any cars in front of the bus that you noticed?

"Answer, Not that I saw.

"Question, More or less, would it be correct to say that these were the three cars on the roadway within your view. That is, yours, the Weiner car and the bus?

"Answer, Yes.

"Question, Traffic wasn't heavy?

"Answer, No.

"Question, You heard all of your husband's testimony?

"Answer, Yes.

"Question, Do you agree with it generally, what you heard here?

"Answer, Yes.

"Question,Is there anything that you think happened in any other matter that your husband testified to that you would like to let us know about; otherwise I assume you agree with his testimony.

"Answer, Yes, I agree fully with his testimony.

"Question, At the time the accident happened, let us say, a few minutes before it happened, was it snowing or raining at all?

"Answer, I don't believe so.

"Question, Were the roads wet?

"Answer, They were wet, yes they were shiny. I know they were wet.

"Question, Was there any moisture being kicked up by the car in front of you?

"Answer, I saw none.

"Question, When had it stopped snowing?

"Answer, I don't know, I know it had snowed previously.

"Question, Did you take any quick way from Albany into the wet -- how did you get from Albany?

"Answer, The Northway.

"Question, Was it snowing while you were on the Northway?

"Answer, I have no recollection.

"Question, From the Northway you get off the Northway and then you make a right turn that takes you onto 149?

"Answer, No, there is an intermediary. You get off the Northway and then for about half a mile you are on Route 9. Then you turn onto 149.

"Question, Just about how long had your husband and you been on 149 in time or miles when the accident happened?

"Answer, Not very long. It is only about a mile, I think.

"Question, Was it, now, was it snowing when you left Albany?

"Answer, I don't think so.

"Question, Was it snowing or raining at any time while you were driving the car that day?

"Answer, I don't believe so.

"Question, Were there any windshield wipers on that Volkswagen, things that spray water onto the windshield?

"Answer, Yes.

"Question, Were they used at all that day by your husband?

"Answer, I don't recall.

"Question, Was the windshield clear when this

speed, your Honor, that I would bring to your Honor's attention. I will have it this afternoon.

THE COURT: I think that just says 55 miles an hour except you have to use your sense. Is that right?

MR. SPATT: I really don't remember what it says.

THE COURT: I think it doesn't say - it says the speed limit is whatever it is. But then it says something else to indicate that that doesn't mean you are supposed to go bowling along at that rate no matter what the traffic and weather conditions are. Because there is the overall limitation of reckless driving.

MR. ZAWACKI: The section is 1180, speed must be reasonable and prudent.

THE COURT: 1180. Something like that. But I think the only one that is of any interest is not any that has enough specificity, so that simplifies our work. All right. Any motions?

MR. ZAWACKI: Your Honor on behalf of the Defendants Weiner, I move to dismiss the cause of action, because there has been no proof of any constant proof of pain and suffering. No need to detail the testimony, we all heard Dr. Kaplan, we

have seen the hospital record. Both are reflecting statements to the effect that the child never really regained consciousness and even Dr. Kaplan had to admit there might possibly be, but even he doubted it. So I don't think there is any, I don't think there will be any arguments from any - there is no cause of action.

THE COURT: It would seem to me Mr. Zawacki, Spatt - there is.

MR. SPATT: I am going to move to discontinue that burden of proof. I think that is the third or fourth cause of action.

MR. ZAWACKI: I move to dismiss the remaining cause of action, the wrongful death cause of action, your Honor, because there has been no proof of any negligent act of Weiners to cause the accident and number two, I move to dismiss that cause of action because the action is brought for the benefit of the next of kin. The next of kin are the Weiners, father and mother.

If recovery had been against the Weiners, that is the father and mother, they will in effect be profiting directly as a result of their own negligence in bringing about the death of Julie. I don't think that result was ever anticipated and I don't

think that such a result should be allowed to be obtained.

THE COURT: Well I think as indicated to you earlier that that renews an objection that has been repeatedly made in such cases as this. And both where the issue is the contributory negligent of the parent or shows who is driving in a case in which one of the members of the family is nominally the Plaintiff and even in the case of where the sole beneficiary of the right of action is the person that alledgedly is solely responsible for the accident. And the Courts have deprecated the existence of the cause of action, but have repeatedly indicated that they consider themselves bound by the statutory form. And to the -- I think I indicated to you that the cases collected in 97 ALR Second, I think indicate the present state of the law and despite considerable confusion, Pennsylvania Courts where they seem to have a very complex - approve the subject. And one other state in which legislature has to some extent modified the situation.

The law is apparently an obstacle to the making of the argument that you make since it is being granted, I thought they were behind it. There could be situations in which creditors would recover from the recovery and that sort, but that doesn't

seem to hold water in view of the specific language of the statute whether at some point the whole issue will be re-examined, I don't know. But I think the arguments that you make, how such trials of this ought to be conducted, it leaves us I think all, that we would be in a lot healthier atmosphere if the Plaintiff in the action were Mrs. & Mr. Weiner and the carrier was the Defendant and everything was in the open and we could go at it with the cards on the table. The way it is now I think that jury must have a rather poor opinion of our inability to cope with real life terms in real life terms. For I fear I must deny the motion on the merits of the motion, on negligence, that seems to be pretty much foreclosed again safety totals INC, 32 New York 162.

Initially a short opinion by Judge Jayson says flatly in reversing a lower Court case, "The Courts charge conveyed to the jury, the impression that they could not infer negligence solely from the fact that the car crossed over the center line of the road into a passing lane of traffic but they must affirmatively find from the other facts in the case that Defendant acted negligently. This impression was clearly erroneous in light of a dispute in Phannenbach, White Plains, 17 N.Y. to D, second,

132. In which he held that the Plaintiff could go to the jury solely by demonstrating that the Defendant's vehicle crossed over the center line into the opposing lane of traffic."

Now the only distinction that I could see is that in this case while there was no explanation from within the Weiner car of how it all happened, there was evidence of the reason for there being no explanation. That is the Defendant was not in any position to defend itself by evidence presented by the people in the automobile. But that does not appear to be a fact that authorized keeping the case from the jury.

I think because it does not eliminate - if I may call it the recipsalacwader, framework under which the whole theory must be and the fact that one can always believe that if there were explanations other than negligent operation they would appear objectively or could be used through evidence of mechanical failure unexpected mechanical failure, that sort. It could be spelled out of the records. But that appears to be the law of New York as near as I can understand it.

MR. CAMERON: Your Honor, for purposes of clarification as I understand it in the first two causes of action that had been dismissed as far as

the complaint is concerned and the third has been discontinued.

THE COURT: Alan's case is not here.

MR. CAMERON: I take it before the Court the only cause of action we are concerned with is with the wrongful death action on behalf of the estate of Julie Weiner, your Honor; is that correct?

THE COURT: That's right.

MR. CAMERON: On behalf of the Defendant Stone I move to dismiss that cause of action on the grounds that the Plaintiff, the record is clear there has been no testimony in this case with regard to contact between the Stone motor vehicle and the Weiner motor vehicle except the testimony of Mr. Stone. The only thing we have in this case is contact between two motor vehicles. And we are looking at your Honor's proposed charge on Page 10, essentially to a Plaintiff's cause of action is that the Defendant's negligence as a factor in bringing about Plaintiff's accident and injury. And with regard to Defendant's negligent, I believe this is a two-part here.

There has been no evidence in this case to show negligence on behalf of Defendant Stone, even if there was some evidence in negligence, there has been no evidence of cordial relationship between the

accident and the injury or ultimate death of Julie Weiner, so, for that reason, your Honor --

THE COURT: For example if there were evidence to support -- what was said --

MR. CAMERON: Even if there was some evidence.

THE COURT: I think the only specific evidence on it was given practically in the language of the safety rules.

MR. CAMERON: Right.

THE COURT: Five car lengths behind at 40 miles an hour which played him plus one on the safety rule.

MR. CAMERON: It is my contention there was no evidence of negligence but even if there was some evidence of negligence there has been no cordial relationship between the impact between these two motor vehicles and the ultimate injury order of Julie Weiner for that reason also, pursuant to Rule 50 of the Rules of Civil Procedure, I move for a directed verdict, your Honor, dismissing this case against both Defendants. I believe that motion under Rule 50 may have been premature, your Honor.

THE COURT: No, I think -- see, under Rule 50A, you have a motion for a directed verdict at the

close of the evidence offered by an opponent. And you can offer evidence if that motion is denied.

MR. CAMERON: I so move your Honor under Rule 50.

THE COURT: But I think most of us brought up in New York think as longer descendants as to dismiss on the Plaintiff's case --

THE COURT: What do you say?

MR. SPATT: If your Honor Please, I feel that there is evidence to go to a jury and that would be the following too closely, 75 to 100 feet, 5 car lengths. Under the circumstances involved and the other conditions involved in this case and secondly, the failure to bring any vehicle to a stop in that period of time, that would avoid an accident that was directly in front of him. And those two things I would say would be jury questions as to whether they exercised that degree of reasonable care and prudence, that a reasonably prudent driver would do under the circumstances involved in this case.

As to the second thrust of Mr. Cameron's arguments: I think that this was an instantaneous thing, both of those collisions happened at the same time although the damage done by the second impact was far less than the first. I think it still

remains a jury question as to what part that played in this case. I certainly think the jury have a right to say that it didn't play any part in this case. I don't say that wouldn't be their answer, but I still say that it is for them to decide this.

And therefore I say respectfully that it is a jury question, that I respectfully do not think your Honor should take it away from the jury because they could find that the impact between the Weiner car and the Stone car caused some or all of the injuries that lead to her death.

They could find that based on this record in my opinion. I think that under those circumstances, your Honor, I think it would not be exercising - rather it still remains the jury question on both of those counts.

MR. CAMERON: Your Honor, in answer to that argument with regard to following too closely, Counsel on behalf of his client has the burden of proof to show following too closely was the cause of this particular accident. I believe the record is clear the accident was caused of course, it is a question of fact for the jury as to whether it was caused by negligent of Mrs. Weiner in going across the road and

striking the bus and bouncing off that bus, having contact with my clients car. There has been no testimony that my clients rear ended or went into the other side of the road and struck the Weiner vehicle; quite the contrary. My client tried to get around the accident and the Weiner vehicle bounced off the bus, came into contact with the Stone vehicle.

With regard to that element of negligence and again I renew my arguments as I said before even if there was some evidence of negligence, I think the burden of proof is a simple principal of law, the burden of proof is upon the Plaintiff to show cordial relationship. At this element what caused the death of Julie Weiner is too speculative to send to a jury as a matter of law. This case should be dismissed because the jury should not get in questioning as to whether they feel it to be that this girl's death was caused merely by contact of two vehicles already after having contact that that already had occurred. It is too speculative and I move that it should be dismissed.

THE COURT: Do you want to be heard on this motion Mr. Zawacki?

MR. ZAWACKI: Yes, your Honor. When the

two contacts or two impacts or two accidents are so close in time that it is speculative as Mr. Cameron points out, then the rule is as I understand it, that each Defendant is liable for a whole injury.

THE COURT: What would you draw from that?

MR. ZAWACKI: Cordial relationship in this case, in the case of the estate of Weiner against Stone it is not proper that the Plaintiff has to overcome. If the accidents were five or ten seconds apart or two, three minutes any injuries caused at each accident were clearly distinguishable there was some evidence or testimony, then Mr. Spatt would have to prove which caused what. But when the accidents, if they're obviously -- there is a claim here there were two separate accidents, this is what Mr. Cameron says. He says his second accident was a minor accident. That there was no cordial relationship between that accident and the death. I should point out to the Court that there was one thousand plus, I know, this is not in the record, but one thousand dollars plus damage to the Stone vehicle. That is in one of these depositions.

These two impacts were so close in time that to ask the jury or a Court for that matter to

guess, speculate or try to figure out what impact caused what damage would be asking the impossible. And when the state of facts exist two accidents so close in time so that no one can really distinguish which accident or which impact caused what then the Rule of the State is that each Defendant will be liable for the total damage.

THE COURT: Well I think that we have perhaps - are in danger of confusing two things. That is if there was evidence of negligence and causation, that then no matter what the contributions of negligence to the accident by the various parties, nobody has any duty to divide damages in turn of which impact caused what damage, but that is a very separate question I think here we are concerned with locating the evidence if any of negligent acts action or inaction on the part of the Stones and the place of that action or inaction in bringing about the happening of the accident.

MR. ZAWACKI: I thought Mr. Cameron had conceded.

MR. CAMERON: I haven't conceded the purpose of my argument.

MR. ZAWACKI: Conceded -- just for the purpose of argument or illustration had conceded

that - let's suppose there is some evidence of negligent, sufficient to go to a jury.

THE COURT: Yes, I think what he meant was no he didn't say that. He says suppose there was evidence that there was negligence, close following, it would have no approximate cause connection with this accident indeed in a bad way, the closer he was following the quicker he would have been past the scene of the accident and might indeed have avoided having the Weiner car strike the rear of his car. The evidence that we have is that he merely got by the accident but that one of the last phases of the accident struck the rear end of his car before this had already cleared the scene of the accident.

Now that is in evidence and confusion of damages. Now nobody can say what if anything it did to the people in the Weiner car, whether that last contact couldn't have been what popped the door open, did something of that sort, we'll never know. But it was not a factor in bringing about the accident.

MR. ZAWACKI: It doesn't have to be a factor in bringing about the accident factor, in bringing about the injuries.

THE COURT: No, only after there is responsibility, liable, then of course you don't - sort that damage and say, well, he only caused this or only caused that.

MR. ZAWACKI: I thought that's what Mr. Cameron was saying. It is obvious there is a lot of evidence. He had driving room on either side from reading the deposition. What kept his car as he said in a straight line with a few feet to the right of his car, on a highway, a few more feet of shoulder, he never attempted to take his car to the right to become -- I think it may be a weak argument but it is a question of fact for a jury.

THE COURT: I think, no, I'm afraid it is not. The motion of Stone to dismiss must be granted so their motion for a directed verdict at the close of the Plaintiff's case must be granted under Rule 50A and it is granted.

MR. CAMERON: Thank you, your Honor.

MR. SPATT: I respectfully accept to your Honor's motion in that regard.

MR. LEVITT: I respectfully accept and I want you to hear me or has the determination been made.

THE COURT: No, the determination has

been made but of course if you think it is erroneous you might as well have the argument here instead of the Court of Appeals.

MR. LEVITT: I respectfully submit your Honor's determination is erroneous with all due respect for the following reasons: and unless your Honor sees fit to dismiss the case against Greyhound too for this reason.

THE COURT: Nobody has moved.

MR. LEVITT: I will, I will. It would appear that the car of the Stones moved a much greater distance. It would seem to me that the car of the Greyhound, it would seem to me the Stones car which was 65 to 100 feet away from the place where the car of the Weiners went off the road continued not only 75 to 100 feet but proceeded further, the distance of the triangle where the Weiner car went 104 feet across the road and then did more than that. Proceeded, didn't come to a stop until some 60 feet in back of the bus. Now the bus itself is some 35 feet, some such thing.

THE COURT: 38 feet I think. Mr. Brown testified.

MR. LEVITT: Here is what I have. You have the car of the Stones going the length of the

bus, the bus was 48 feet -- following in back of a car approximately 100 feet, 75, 100 feet now, that's 200 feet. Now we're going from the time of the impact. Then a distance of length, and angle, am I making myself clear?

THE COURT: In other words it would be the perpendicular of the hypotenuse in which a 104 is the length of the hypotenuse.

MR. LEVITT: So it would make it the length of probably 300 feet roughly. 250 feet, some such thing. Without coming to a stop at all.

THE COURT: 204 plus 75, plus 38.

MR. LEVITT: Plus 38, plus 60.

THE COURT: What is the 60?

MR. LEVITT: What is the 60? The 60 is it came to a stop 60 feet behind the bus.

THE COURT: Well it had an assist behind the bus.

MR. LEVITT: It didn't stop.

THE COURT: It was transferred to the westbound lane and at the very end the testimony was facing the rear of the bus.

MR. LEVITT: Neither moved to his right or left at any time.

THE COURT: That's right.

MR. LEVITT: I say on all of those facts there is a question of fact for the jury to question on the cost.

THE COURT: I think it might - I can't imagine a situation which I can tolerate a verdict of the jury against the Stones. See, the evidence fails to disclose any action or inaction on their part which contributed to the happening of the accident.

Now, they did not precipitate the Weiner car into the bus.

MR. LEVITT: No question about that.

THE COURT: They have from that point on I think, he said, was moving at 35, 40.

MR. LEVITT: 40 miles an hour.

THE COURT: Everybody has agreed on that. Therefore the speed of travel within the order of 60 feet per second.

MR. LEVITT: Right.

THE COURT: The whole thing, no matter how you stretch it out was a matter of three to four seconds. The choice which he had was the choice of in effect, slowing down in the hope of avoiding an accident of the kind here involved or the choice of proceeding in the lane with the

accident at his left and he made the latter choice. Nothing in that choice did anything more than expose the Stone interest to possible damage. But whatever action he took in this accident would be oriented only to the preservation of the Stone car from involvement. And could not be a factor in the happening of the accident with which he was faced.

He was faced with an accident in progress of happening. And he continued on past which was one way of getting through the accident before its debris as it were involving him.

Now I think the Stone's Motion to Dismiss cannot be denied.

MR. ZAWACKI: Your Honor, can I read one thing to your Honor?

THE COURT: Yes, sure.

MR. ZAWACKI: I am reading from this book. That is often used in the State Court, pattern jury instructions.

THE COURT: Used in this Court too.

MR. ZAWACKI: Section 2: 71 "There maybe more than one proximate cause of an accident --"

THE COURT: I agree.

MR. ZAWACKI: -- "where two parties by their separate and independent acts of negligence

furnish direct cause -- "

THE COURT: Agreed.

MR. ZAWACKI: -- of a single injury to another person."

THE COURT: Agreed.

MR. ZAWACKI: "It is not possible to determine in what proportion each contributed to the injury."

THE COURT: Agreed.

MR. ZAWACKI: "Either is responsible for the whole injury -- "

THE COURT: Agreed. But not applicable.

MR. ZAWACKI: I don't want to be redundant and I won't be. But I have a cross-claim although it may not be formalized in the Pleadings, we were sure --

THE COURT: No, if they were held liable, now this doesn't pass on any separate counter-claim that you may have against him because you are not litigating that. But you are really keeping alive your Dole and Dowd rights. I do have that very much in mind because it was after I heard the evidence; because I at that point was thankful there were no counter-claims, because I think that if there were counter-claims, we would have to deal

with that separately. And at that point, without having thought about it, my belief is that would have reached the same conclusion. But that is entirely speculative because there is no distinct counter-claim for that breach on the part of Stones that where due care owed to the Weiner car.

MR. ZAWACKI: But your Honor, I have got a substantive right to a cross-claim here just as if I had pleaded. Dole Dowd gives me that. The Dole Dowd whereas two years, your Honor, could have told me I have no standing to contest this proceeding. If a claim against a co-defendant, now the Court felt I do have the right whether I plead a cross-claim or not, I have got one, but benefit to the benefit of the Dole Dowd decision.

Now, you are putting me in this position. I think I now have a valid cross-claim against the Stones for contribution and haven't had an opportunity to prevent - to prevent any evidence.

MR. LEVITT: I think that is so, if your Honor please, and that applies to my situation too. In the Dole Dowd situation. There are cross-complaints here, automatically, as your Honor knows.

THE COURT: Yes.

MR. LEVITT: They cannot be dismissed, I

don't believe, until the determination of the action.

MR. CAMERON: May I be heard now, your Honor?

THE COURT: Yes.

MR. CAMERON: Your Honor, it is my understanding when I Moved to Dismiss, I was moving on principals of negligence. It is my understanding, the Court ruled as a matter of law the Defendants were not responsible; were not negligent with regard to this accident. If that be the case and the Court is correct which I concur with the Court, then there is no way as a matter of law these Defendants can seek identification on these - on negligence because as a matter of law there is no negligence charged against Defendant Stone.

So therefore I cannot be responsible.

THE COURT: I think - see, there is the second aspect of the thing. If supposing the Stone car had been following at a 1,000 feet and the accident was substantially plowed and then the Stone car could crash into one or both of the vehicles involved in the accident - that has happened. You would, see, have an independent breach of duty for which it could be answerable.

Now, if there is any such - I don't think it's here, but I do not think that in this case any festage of negligence of action or inaction on the part of the Stones has been even remotely suggested by the evidence.

MR. ZAWACKI: We've got a case where there are cars on the Belt Parkway; Car A, driving along, hit by Car B. Then if we follow your theory, your Honor, I say this with all due respect, when Car C, who is traveling along cannot stop in time, would have to dismiss his - the case against him. And when Car D, who is traveling along cannot stop in time, hits Car C, we'll have to dismiss the case against him right on down the alphabet.

But I ask your Honor to look at the more practical effect of this decision. And I don't know what the ruling is going to be with Greyhound. Quite frankly I'm very apprehensive about that now. But the practical effect of this ruling will be the fact the jury will see Zawacki and the Weiners standing, left alone before them or the Weiners and Greyhound and as jurors often do, conclude, well, they are left, they must be it.

Since Mr. Cameron's participated in the trial from the very inception, we are just about done now.

I would ask your Honor to consider the predjudicial effect of dismissal of the case against him that would have as to the remaining Defendant or Defendants.

THE COURT: No, I simply do not see any basis upon which the Stones can be retained in this action, there isn't a scintilla of evidence of fault on their part.

MR. ZAWACKI: Would your Honor direct they remain here to be used?

THE COURT: As witnesses, oh yes indeed. Yes, sir.

MR. LEVITT: May I - has your Honor ruled then in the Stone case? Your Honor has ruled in that case?

THE COURT: Yes.

MR. LEVITT: May I respectfully object to that.

Now may I Move to Dismiss the action against the Greyhound in this case on the law and on the facts and all sections of it, WPLR, they are applicable thereto on the ground that what applied to the Stones applies with much greater effect to the Greyhound Corporation, in that the Greyhound Corporation was on its side of the road proceeding at a rate which nobody questioned here. The facts are clear. The testimony

is at one point he says, 35 miles an hour. Another point 30 to 40.

At any point at a speed testified to here, uncontradicted, less than the speed at which either the Weiner car was going or the Stone car was going. There is no question about that.

The unquestionable fact is that the Weiner car going at 40 miles an hour and I can read, your Honor, the exact statement made by the Stones, was going at 40 miles an hour, continued at 40 miles an hour, hit the side of the road and went a 104 feet. It is clear at that point even forgetting the fact the bus testified to by the Stones was stopped, fast, was the word. Was almost, was maybe, was stopped and the bus driver's statement that the bus was almost at a standstill.

But forgetting all of those, leaving those out of consideration, the Weiner car moved 104 feet from the impact to the collision with the Greyhound bus.

MR. SPATT: Your Honor, I must interrupt to object to that. There is no such testimony in the case. The only thing about a 104 feet that on a form it said, length of skid marks, 104 feet.

THE COURT: Oh, no, no. Mr. Stannard's

testimony.

MR. SPATT: Stannard's testimony was a 104 feet?

THE COURT: No, his testimony was that he measured the distance from the point of contact with the guard rail to the point of impact as determined by the impact degree.

MR. LEVITT: Now, taking my -- taking that fact into consideration --

THE COURT: I think we can speculate that's where the 104 feet in the Greyhound report comes from. As from the police record.

MR. LEVITT: Questions asked, came from the police, yes.

THE COURT: We don't know because the man who prepared the Greyhound form has not been a witness to this point.

MR. LEVITT: In view of the fact the whole incident, even assuming that we only have the movements now, because if you have movements of two cars it is less.

THE COURT: No, wait. Don't fall into that trap. The 104 feet is the distance of travel of the Weiner car only because inevitably, the bus was 104 feet east of the point of impact as well.

So to make their collision pass, each of them had to prove through the same period of time --

MR. LEVITT: At any rate, the time period that is involved here from these facts could not be approximately more than a second and a half.

THE COURT: Unless and - see, here, we are baffled by not knowing just what everybody did. Now what Mr. Brown says was that it was nearly as he could guess, he was some 225 feet distance from the Weiner car when it made contact with the guard rail. And while it was traveling a 104 feet in a diagonal path, then he would have been traveling say a 130 feet up, direct linear travel and applying his brakes.

Now we don't know whether Mr. Weiner was able to make any brake application or sort to make any brake application or not. But if not, then, possibly the car was traveling 40 miles an hour and perhaps someone will ask, because we have to speculate, we don't know for sure.

Now that would be maybe two seconds, a minute, three-quarters of a second, maybe more if the car was slowing down. But I think we are a little bit intrapped by lawyers, always insisting that people give feet, et cetera, et cetera. And

estimate rates of travel. Not at a time when we all recognize some, can you expect generally to be able to do these things. If they are paying attention to their driving, they are not looking at their speedometers in these times of crisis , nor are they trying to measure out distances. So all these time and distance words that we hear in the courtroom are reconstructions.

They are self-argument. All we can say is things that we can really click to are the statements that are blurred out that happened in a moment, happened in a flash, all happened very quickly of course, it did or it wouldn't have happened at all.

Now, what is significant is that this - every -- fraction conditions, traction conditions, not perfect, not terribly second-rate, traction conditions in which the driver felt that it would have been unsafe to quote "jam on his brake" quote.

He felt although he couldn't say it with confidence that he brought his bus pretty well down in speed.

See now, that gives little better, more time stretch here.

MR. LEVITT: Even with that time stretch, if the testimony --

THE COURT: We are still talking about something that happened in a flash.

MR. LEVITT: The testimony of the Stones is that the Weiners continued at 40 miles an hour. I can show you your Honor, that thing.

THE COURT: Yes, but again I say --

MR. LEVITT: That is the testimony taken, so it appears we were going slower than the Stone car, we covered less distance than the Stone car, we were on our side of the road. We tried to -- we made an effort to avoid striking the Stone car, had been going straight, it made no effort to avoid the -- even if the Weiner car slowed down, the Stone car had more time than we did on that, on all of those things, if your Honor dismissed the Stones, I respectfully --

THE COURT: I don't think it is a question of what I did with the Stones, now you are arguing your case.

MR. LEVITT: Oh no, the only reason I am arguing the Stone case is for comparative purposes, if your Honor please, and to show that we were certainly in the position where we were not negligent. On the physical facts and the admitted facts.

THE COURT: The difficulty the Stones were

dealing with, somebody elses accident in which they were not involved really. And where they had to deal with their own safety. When faced with an accident happening in their - under their very eyes.

Now I think Mr. Spatt's case against you is that you didn't take any evasive action of any kind, contrary to the description.

MR. LEVITT: The Stone car admittedly took no evasive action.

THE COURT: I know, will you please argue your case.

MR. LEVITT: I will, Judge, I intend to, but I must make the comparison.

In our car the Stones have testified, the cop testified that any point of contact, the officer testified, the point of contact was half on and half off the roadway which indicates evasive action. We hit the brake because it is obvious from this thing the testimony is nobody denies it, the Stones say we were either stopped or slowing down; we were going slower, we did hit our brakes.

We took all possible - even on the picture, the pictures show the wheels turned. The officer, this man did more on the record, than I think under the circumstances, anyone could be expected to.

The officer said, something, he said yes, there, the normal reaction time is three-quarters of a second to a second. That is normal reaction time.

THE COURT: I wonder if we can judiciously notice that because the New York Courts have said bus drivers aren't experts.

MR. LEVITT: The bus driver who said -- the police officer --

THE COURT: But I believe that's what the text books all say, but I'm sure they all have experts to come up and say, oh yes, the time is 34 seconds based on the Indiana University State made up Bloomington, over a period of years, et cetera, et cetera, et cetera, et cetera.

MR. LEVITT: Generally accepted though I think your Honor the reaction time --

THE COURT: All I am asking, are you allowed to judicially notice --

MR. LEVITT: I think your Honor is the one, the policeman testified to - he testified to without objection --

MR. SPATT: I don't think he testified, he was very unsure about that.

THE COURT: It was rather glancing testimony.

MR. LEVITT: But he said this average three-quarters, all those things in the case if your Honor please I respectfully submit the action should be dismissed as against Greyhound.

THE COURT: I take it Mr. Spatt doesn't agree.

MR. SPATT: No, sir. I think there is clearly evidence in the record to show that the bus driver not only did what a reasonably prudent person should have done but did almost nothing. And I specifically direct your attention to the testimony I just read to the jury from the Defendant Janet Stone. Who was in a position in the panorama going downhill, as to question that we had an objection to, your Honor looked at that question, that is the only one you saw as a matter of fact:

"Question, Would you tell us whether it appeared to you that the bus had swerved at any point before the contact took place?" And after that the haggling between Counsel, she said, "I did not answer your question, shall I answer the question? No, it did not appear that the bus had swerved."

Point two, the question to the bus driver on Page 13 of his deposition: "Question, How far

--"

THE COURT: That was read.

MR. SPATT: Yes, sir. "How far was the left side of your bus at the time of the collision from the center of the roadway and approximately one foot to the right on my side."

If he was one foot to the right of the center line he can assume that there was little or if any effort to get to the shoulder of the road but instead, he was driven to the guard rail by the tremendous impact on his left corner which was enough to tear away part of the bus and certainly, the jury could infer that that bus if pushed back was pushed to the right, that's where the force went.

THE COURT: To its right?

MR. SPATT: To its right. If that is so, if he is true in saying it from the center line, did he do - not only what a reasonable prudent person could have done, but did he do anything to prevent the happening of this accident. And certainly I think there is a jury question.

I am not going to go into detail, the fact that he testified in the Motor Vehicle Bureau, "I observed Mrs. Weiner coming down a slight grade when

I noticed her."

"When I noticed her."

She hit the guard rail on the right side, bounced off. The previous question was, "When you first saw her vehicle, how much distance was there between the two of you?

"Answer, It's hard to say, I would say roughly 800 feet."

Now Mr. Levitt can say that 800 feet when he saw her look at the language when I noticed her.

THE COURT: I'm afraid I can't accept your interpretation of that evidence.

MR. SPATT: Maybe you can accept this though, your Honor. When in evidence there is this language. I didn't put it there.

"Location on roadway when danger noticed of the car on top of the hill."

And we know from testimony there is no question about it, the top of the hill was 800 feet from the impact. And that alone in my opinion clearly presents a question of fact to this jury as to whether he did do everything that a reasonably prudent - not the greatest genius or the best person, but what a reasonably prudent driver would do to avoid what was apparent to him, was going to be a

disaster.

In which he said he saw at the top of the hill in this report.

Now your Honor can say well, this report was in the hospital, he was sick. It is true. But isn't that a question for the jury to decide? The effect of this statement, I think, it is devastating, your Honor. Therefore I believe to a dismissal as to Greyhound --

MR. ZAWACKI: Your Honor, we are discussing this, we are taking the approach here that the police officer is infallible in his --

THE COURT: I don't think so.

MR. ZAWACKI: You see, we are basing everything on the fact that while I measured from here to there -- now we know there was right at this - where the impact was or very close to where the impact was - but here, where the Weiners first left the road, the jury doesn't have to believe the police officer, that's 104 feet away. The police officer might have been mistaken. He wasn't there when the accident happened.

THE COURT: That's right, but you see, there is no other evidence, that is the difficulty, Mr. Zawacki. And it seems perfectly compatible

with every bit of evidence that we do have. I mean, the case can't be made wholly out of speculation.

MR. ZAWACKI: Oh no, your Honor, there is much other evidence. Now just take for instance what the bus driver says, the car was 800 feet away when I saw it in trouble or in danger.

THE COURT: I'm afraid I do not -- cannot and will not accept that as being a correct reading of the man's testimony. It takes his testimony out of its reading.

MR. ZAWACKI: All right.

THE COURT: Now, the report, I don't know who was responsible for the preparation of that, but again you would have to read that along with the narrative which hardly gives that explanation at all.

Now, why it was said, that I don't know. I think we have to deal with the realities that we have before us. Now this dreadful accident happened when the bus - agreed, there is no evidence to the contrary on this - that the bus was simply coming down the road.

Now, that is not negligence. There is no evidence that the bus was traveling at an excessive rate of speed, that is was pursuing an erratic course,

that it was out of line or that it was doing anything which could have produced in Mrs. Weiner's reaction of some sort that would make her take a maneuver which led her into trouble in order to avoid an accident with a car and her front.

For example, if the bus had been weaving off the left well, you could argue, well, she started to try to get farther off the right to avoid it, hit the guard rail, bounced across this road, you could introduce all sorts of speculation. But the only evidence is simple unmodified regular approach down to the highway, the bus traveling at a moderate rate of speed.

Now I don't think we can take any 50 miles an hour as being a measure of excessive, of marking the fact that all of these vehicles were traveling at excessively modest rates of speed because we know on a rather wintery day, that there was, the roadway was not perfect.

So there was an excellent reason for vehicles not being traveling, not traveling as they might otherwise have been on the road that was substantially empty except for three of them. At high rates of speed. But we have no evidence, anyone was traveling at rates of speed nearly approaching

55 miles an hour.

All the evidence is I think, the highest number mentioned has been 40 miles an hour. Figures as low as 30. 30 to 45, 30 to 40. 35, 40. Thereabouts. Reasonable to accept that testimony, of course.

All right. Now, the only question really I suppose is what could Mr. Brown have done to avoid the dreadful accident. Could he have applied his brakes, that's all. And he did.

MR. ZAWACKI: Your Honor, in taking this approach, your Honor, I admire the Court's thinking because reasonable men would probably agree that the cause of this accident was the Weiners, but in our --

THE COURT: Well I'm not sure about that.

MR. ZAWACKI: The Weiners automobile, lets say, the action of the Weiners automobile.

THE COURT: You see, I think that the Weiners were trapped in against the safety -- just trapped.

MR. ZAWACKI: But your Honor, in our State even if one has the green light and somebody comes through a red light --

THE COURT: That's right.

MR. ZAWACKI: -- the Court says the cars just can't go through that, they have got to look.

THE COURT: Sure.

MR. ZAWACKI: If any car has a stop sign you are on this highway, you can't say we'll get the right to go.

THE COURT: You can't drive on your right of way.

MR. ZAWACKI: Now here we have a bus driver and your Honor just adopts these measurements. The bus driver's case, the car was 250 feet or 225 feet, your Honor obviously doesn't like the "X number of feet."

THE COURT: What's that?

MR. ZAWACKI: Your Honor obviously doesn't like the 800 feet as everybody has been testifying to.

MR. SPATT: It was testified to.

THE COURT: Please do not read that to me again, you are misreading it. That is not what it significantly means.

MR. ZAWACKI: Your Honor, let us take the 225 feet to 250 feet that Mr. Brown said from the witness chair here.

THE COURT: I think he said 225 is the highest number he gave, I think or the numbers were 150, 175.

MR. SPATT: He said 225, 250 in the explanation before trial.

THE COURT: That's right, that's right. 250 was the biggest number he gave.

MR. ZAWACKI: If we take either the 225, 250 as being true, because obviously he didn't deny he made that statement.

Now lets assume then the police officer is right at a 140 feet, that the Weiner car went, you subtracted a 104 feet from the 250 or 225, you get a much greater distance. We know the Weiners are going about 40 miles an hour because Mr. Stone has told us that.

THE COURT: He was doing 40 to maintain distance.

MR. ZAWACKI: Yes. The bus has not been going a lot faster than the Weiner car was going to travel a greater distance in the same amount of seconds. We are not bound --

THE COURT: That would be true, but for what I said before. That, you see, we are now talking about a back casting estimate of distance and we are comparing it with a measured distance. The man asked how far over was it. Well, you know, even without allowing for the tremendous differences

between outdoor and indoor. The witness testified to 250 feet, then the lawyers say to him well, how far is it from the witness chair to the back of the courtroom.

The lawyer knows how far it is. And then by using the error in estimate he is able to undermine the witness's testimony. One of the standard procedures in the examining witnesses who presented us with estimates of distance.

So here you see you cannot compare an estimate of distance from given circumstances in which Mr. Brown was asked to and had to give his estimate of distance with the measured distance. All we can say is yes, something like that, he was good and he was far enough so that he could do something and he said he did, he jumped on the brake.

MR. ZAWACKI: But you Honor, it is not our job to rewrite the script. Mr. Brown when asked how far was it can say and I quote, "Truthfully, I don't know."

Now after he comes and talk to his lawyer, realizes or looks at his testimony, realized what I just said to your Honor, he must have been going faster when he looks at the distances, realizes that, now he comes on the witness stand and says a 175 feet.

In effect now we write the script for him. There is nothing to prevent a witness like Mr. Brown from giving this obvious honest answer, I don't know. But when a witness --

THE COURT: Now I think what he does is he gives the number estimate. Now we can work with that if we want, but I am saying to you that you can't extrapolate that into further argument. But what we are really talking about is what did Brown do or fail to do, that event of reasonable care in the premise.

MR. ZAWACKI: All I can say your Honor, he did - I would agree your Honor, did nothing to affirmatively cause the accident, but once it was apparent to him that Mrs. Weiner was in trouble, and he said I saw it coming for a long way off, he said that, and there is no misinterpreting that testimony of his. I read it to him. I said you saw it developing, I saw it coming a long way off. The question now is what did he do after that.

We don't accuse him of taking affirmative action. What did he do when he saw the danger developing a long way off. If what he said in the deposition about being one foot from the center lane is true, then he didn't pull to the right. If what

he said about hitting the brake firmly is true, then he didn't hit it perhaps firmly enough.

The jury's got the right to decide that, he should have hit it harder or he should have gotten over further to the right. I don't think we can take that away from the jury in this case.

THE COURT: Yes, I'm afraid I can and will do.

MR. SPATT: Your Honor, may I be heard before you do that?

THE COURT: Yes.

MR. SPATT: I think, and I speak most respectfully, your Honor, that your Honor really is deciding a question of fact here.

THE COURT: I do not think I am or I would not.

MR. SPATT: Well I respectfully --

THE COURT: I think we have been - we must be rational. There isn't any evidence of Greyhound negligence here.

MR. SPATT: I just pointed out about four different things that I respectfully submit are evidence and I would like to go over them again.

THE COURT: Yes.

MR. SPATT: Because I think it is very

important, I don't like to take up a lot of time, I think it is very important. He said in his form that I saw danger on top of the hill, your Honor. Your Honor has now seen fit to rule that out of the case.

THE COURT: Yes.

MR. SPATT: I don't know how you can.

THE COURT: I will say that and say it and say it.

MR. SPATT: In the form -- not talking about --

THE COURT: Because look, for one simple reason, we know it wasn't so.

MR. SPATT: Well I don't know about that, Judge.

THE COURT: I do. Because I sat through the trial and heard the evidence. There is not any evidence that the Weiner car was in trouble for one split second before it veered off the road into contact with this guard rail.

MR. SPATT: Then the 800 feet --

THE COURT: Is not in the case.

MR. SPATT: Well, I don't know how you can exclude it from the case, Judge.

THE COURT: For the reason explained.

MR. SPATT: He said the bus, the second thing I would like to bring up, evidence, that there is no evidence of negligence.

THE COURT: Yes.

MR. SPATT: He said the bus didn't skid, I pressed the brake firmly but not down all the way and I dropped the speed of the car - of the bus. I respectfully submit that is a question of fact for this jury as to whether he should have applied his brake, he didn't skid, no other car skidded, everybody had traction on the road, even Mr. Stone who jammed his foot on the brake didn't skid. I think it is a question of fact for this jury as to whether he shouldn't have jammed his foot on the brake, maybe this girl would have been alive today.

THE COURT: What would have happened?

MR. SPATT: Instead of stopping he said in 60 feet or 70 to 80 feet, he stopped his vehicle. Your Honor has taken a distance of a 104 feet. That 104 feet wasn't due east. That 104 feet was a diagonal across the road that wasn't even 90 feet, that wasn't even 80 feet.

THE COURT: No, no, because you could figure it out. Because it would be 20. Be about 30 feet would be the vertical of that hypotenuse.

MR. SPATT: Well then, it's not a 104 feet due east.

THE COURT: No.

MR. SPATT: He didn't travel a 104 feet. Now this man said I stopped this bus in 60 feet or 70, 80 feet.

THE COURT: See, his testimony was he brought the bus almost to a halt at the moment of contact.

MR. SPATT: If he had done that we know there would be no accident, Judge. We know if that's true there would be no accident here if he saw the bus 220, 50 feet away, that's his version of it, then your Honor can't say well he doesn't know what he's talking about.

THE COURT: I wish I could agree with you.

MR. SPATT: Well your Honor, I really think - I would really respectfully ask you to reconsider this. This is a most serious decision.

THE COURT: Of course it is. A most serious decision. It would be an even more grievous decision were I to hold that the jury can speculate and invent a liability and impose it on Greyhound on the facts in this case.

MR. SPATT: Your Honor, do you give no

credence to the fact the man testified, EBT, he was one foot from the center line of the road at the time of the impact which would make him having done no swerving, all he - he never tried to get out of the way of this accident; he never swerved his wheel to the right when he had a four foot shoulder.

Couldn't the jury say with reasonable credence that he should have swerved. Mrs. Stone said he didn't swerve, he said it himself. I didn't do this, I wasn't even there at the EBT. I didn't produce this testimony.

THE COURT: What has that got to do with it?

MR. SPATT: Your Honor said there is no evidence of negligence. I say --

THE COURT: I do.

MR. SPATT: I respectfully submit the fact he didn't move that bus over the center of the road is evidence of negligence when he saw this danger coming.

THE COURT: I disagree.

MR. SPATT: But your Honor disagrees as I rely on a question of fact?

THE COURT: No I am not. There is no evidence of negligence on the part of Greyhound Lines Incorporated in this case. The bus was proceeding

in a regular course at a regular speed down a roadway. And was in a head-on collision with an automobile that struck the guard rail, came diagonally across the roadway and smashed into the front of the bus before the bus driver could bring it to a stop. That is the entire case.

It is not susceptible of an explanation of loss or of anything else that can be converted into negligence on the part of Greyhound Lines Incorporated.

MR. SPATT: And the fact the impact occurred in the center of the westbound lane and he was one foot from the center line; w areas, if he had been - gotten over onto the shoulder in fact before this accident --

THE COURT: Now, just a moment. You see if one were to disregard the semantic triumphs of the lawyers over Brown, and rely wholly on the physical evidence, then it would be reasonably clear that he had unreflectingly some how or other got the bus over to the right, somewhat. How much, impossible to tell because we don't know for a certainty whether the path of the Weiner vehicle had as you suggested, I guess Mr. Zawacki suggested -- at the end of this line of travel, a straightening movement or not.

See, you leave that out when you say that he was in the middle of the road and he was driven over to the guard rail with which the bus was in contact when it came to rest. Now that may not only be the case, but there is no other evidence that I think would be based on interpretation of Mr. Stone's evidence that at the very end of the diagonal travel there was a straighting movement.

MR. SPATT: I brought that out.

THE COURT: Which resulted in a head-on collision. You see that?

MR. SPATT: That is a question --

THE COURT: I think you see that's at war with the other statement you make that the collision was such as to move the bus over to the guard rail.

MR. SPATT: Look at the point of impact on the photographs of the bus, your Honor.

THE COURT: Which is hardly compatible and with the front of the Chrysler.

MR. SPATT: But you'll see the point of impact is the left corner of the bus, that's the point of impact.

THE COURT: What corner of the Chrysler?

MR. SPATT: The whole --

THE COURT: No, no, because if you'll look

they say that solves the problem, [illegible]

at Mr. Cameron's pictures, of the contrast between the two sides of the car, which one shows the gross shattering?

MR. SPATT: The left.

THE COURT: May I see it?

MR. SPATT: Yes, sir.

THE COURT: In other words, this would mean what?

MR. SPATT: I don't know what it would mean, Judge. It would mean either he hit more on his left side of the front coming on an angle; hit him in the left side or he came around and hit him as he started to come around, but even if he did that --

THE COURT: Now, take the latter, you see?

MR. SPATT: Yes, sir.

THE COURT: Then, if you look at the one of the right tire, see the right tire which we are reasonably sure it isn't the rear tire because it isn't a snow tire. The right side of their car which would be the part that should have been most grossly shattered in the diagonal impact was not as grossly shattered as the left front of the car; so that the driving to the guard rail point that you make is very, very much reduced in force.

MR. SPATT: May be [illegible] Honor I don't agree

with that, but it is a question of fact for the jury

THE COURT: No, because you never get to that point, because I have ruled.

MR. SPATT: I must except from your Honor's ruling.

THE COURT: Of course you must. I think the jury will grant you the indulgence of a little while for lunch. Could you get back just as quickly as humanly possible, gentlemen.

MR. ZAWACKI: Your Honor, could I inquire what time is scheduled? The Plantiff's rested; there is no one but I am going to put Mr. Barry Stone on for five or ten minutes and I am finished. Are we going to do anything further today - I am going to rest?

THE COURT: We'll look at the charge.

MR. LEVITT: If your Honor please, there are certain exhibits in evidence, some belong to me, some belong to Counsel, some belong --

THE COURT: You have to leave your exhibits.

MR. LEVITT: All right. Can we get --

THE COURT: Mr. Spatt needs all the exhibits?

MR. SPATT: Yes, sir.

MR. LEVITT: Can we get together, if your Honor please during this hour and decide what exhibits

Now I am going to skip a lot of

we are leaving here and then decide which are ours, ask the Clerk with your Honor's permission.

THE COURT: We are charged with the responsibility for them, I can tell you with great simplicity, you are leaving every single exhibit here, either Mr. Spatt or Mr. Zawacki may need them.

MR. ZAWACKI: Let's go down the list with your Honor's permission.

THE COURT: I think you will find Mr. Wall has the list there.

MR. LEVITT: All right.

MR. SPATT: I would rather do it after coming back from lunch. I have to go.

THE COURT: He's got a case to get on with. See, you fellows are going to walk out to the Court of Appeals, get you back in here.

MR. LEVITT: I don't want to take anything or believe I am taking anything that they might need. I don't want to take it.

THE COURT: You are not going to take a completed exhibit.

MR. LEVITT: But I don't want them, after the case is over take any of my exhibits because we may need it for another case.

THE COURT: We'll make sure you get your

exhibits.

MR. SPATT: Judge, you are not going to expect us to go into summations today, your Honor.

THE COURT: No, we will do the charge.

(Whereupon a luncheon recess is taken at 1:45 P.M.)

(Whereupon the following proceedings are resumed at 2:55 P.M. out of the presence of the jury:)

THE COURT: Yes, sir.

MR. SPATT: If your Honor please, I would like to make two motions. My first Motion to Discontinue the Case against the Defendant Louis B. Weiner.

THE COURT: Now, do you say to that Mr. Zawacki --

MR. ZAWACKI: I don't think he can do it, I don't want it discontinued I don't think. I don't think he has that right, within this case, I want costs on behalf of Louis B. Weiner. I don't think he has the right to do it now. I don't consent to that.

THE COURT: Are you entitled to only one bill of costs? You mean to cover depositions and everything else and then see the other things, apart from the technical dispersments are even more

I circled it there.

miserable in the Medical Court than they are in the State Court, I think you get roughly here equivalent of the docket and fees, maybe not much more.

One other thing here. Who raised the question about the tire?

MR. SPATT: Not Mr. Zawacki, your Honor.

THE COURT: Not Mr. Zawacki, no, sir. Of course not, he wasn't interested in showing want of his negligence.

MR. SPATT: But I am going to make a Motion to Discontinue against Weiner regardless of what evidence there is there, I would Move to Discontinue.

THE COURT: See what I suggested here is that there might be a ground of independent negligence against him for maintenance of the motor vehicle, if that's in the case. And a jury's attention has been drawn to two tires.

Now I don't know that we have any evidence of the condition of the tire, is compatible with his being a substantially fresh tire. Do any of you -- I don't know that you can tell. Does any of us know?

MR. SPATT: I don't know.

THE COURT: I certainly don't.

MR. ZAWACKI: I quite frankly, your Honor,

I am trying to function as fast as I can here. I don't understand why Mr. Spatt wants to discontinue against Louis Weiner and I don't know - I think I am entitled to know that.

THE COURT: I think so.

MR. SPATT: I am entitled because I think he is only passively negligent, I think he doesn't belong in this case, therefore I move to discontinue, I wave any rights that I have against him as a driver. I mean as an owner, I'm sorry.

THE COURT: What Mr. Zawacki has to figure out here is what if any prejudice can flow to Mrs. Weiner and the case from that dismissal.

MR. ZAWACKI: I can't see any, but instinctively I say I don't want it. Of course if it is a motion pending before your Honor, I've got no control of disposition, the Court's disposition of it. But I just want to make my position clear on the record.

THE COURT: The thing that -- notionally they are quite different parties and might have appeared through separate Counsel. Had they done so I suppose -- you may remember this came up, employer - employee case, sometime back, that theoretically I guess the owner of the motor vehicle

always has a claim against the driver who involves the owner in automatic liability without fault.

Now when you have someone in the position of the carrier here that alone gets obliterated, but I suppose in theory it's still there, what are it's consequences here. I suppose they are nil, aren't they, because any such notional claim over --

MR. SPATT: It worked the other way. The other claim over would work not.

THE COURT: No, because I was just wondering is there any carrier for that claim over. I suppose not. We're never going to get to the end of this case.

MR. ZAWACKI: We may find out someday what the reasons are or what the significance of it is. I can't see any at this moment. I am quite frank to say.

THE COURT: Well I will grant the motion subject to reopening the issue if anything affirmatively is prejudicial to Mr. Weiner or the carrier is made to flow from it so that we can then re-examine the issue on the merits. But at least I don't see any damning that could flow at this stage of the case from it. It seems to me that if it has any consequences it would be only in the area of indemnification

Let me narrow it down a little bit if I can and any post-verdict problems that we may discover.

Now, if the inquiry has to be pursued in that area and the prejudice that we are here today appears, then I think we have to take the motion fully under readvisement. That will be the condition of the granting of the discontinuance.

MR. SPATT: I have another motion to make, your Honor.

THE COURT: Let me make note of this first.

MR. SPATT: I would like to respectfully Move, your Honor, to Strike that part of the testimony in this case and specifically with regard to the cross-examination of Mrs. Barbara Weiner by her lawyer, Mr. Zawacki, with regard to stating to the jury, number one, that she was the beneficiary of this estate.

THE COURT: A beneficiary?

MR. SPATT: A beneficiary of this estate and that question to the effect that you know that if you win this case you will benefit by your own wrong, or words to that effect that were used by Mr. Zawacki which your Honor overruled, an objection to during the course of that examination. And I do that respectfully because after giving it a lot of thought, I think this is in view of the law of this State, improper, highly prejudicial and irrelevant

to the cause in this case.

THE COURT: No, I think I made clear to you, that as I understand it, by the way there is something that we haven't talked about at all, maybe we should talk about it now. Well, in just a moment.

I proceeded on this assumption with Counsel that the sole beneficiary here, Mr. & Mrs. Weiner, under the Decedent State Law. I could never remember its right name.

Estate Powers and Trust. And inconsequence she is a distributee and is a person who would benefit from the recovery here. Inconsequences that gives her an interest which the jury is entitled to know she has when it hears her testify. And I cannot retreat from that because as I understand it if Section 5-4.41 is applicable as I understand it is, there was no denial that she would be a beneficiary. Should we look at 4.4 together?

MR. SPATT: Under that I think she would be a beneficiary.

THE COURT: I don't know, let's look at it.

MR. SPATT: Doesn't say that.

THE COURT: What does it mean?

MR. SPATT: It means - it said that I think that it shall be distributed by the personal

representative which is Mrs. Audrey Weiner, to the persons entitled thereto in proportion to the pecuniary injuries suffered by them.

MR. ZAWACKI: Who do you think decides that?

MR. SPATT: Well I respectfully submit that I have --

THE COURT: We can have a separate hearing on that.

MR. SPATT: Well I say that is --

THE COURT: What's the only way we can run into that was compromise. I think Counsel agrees?

MR. ZAWACKI: An order.

THE COURT: Deceased Estate Law.

MR. SPATT: It doesn't say that in the statute.

THE COURT: It doesn't say that, no, but nobody could think of anything better.

MR. SPATT: There is a case, matter of Kaiser that they generally use to divide this proceed.

THE COURT: Among the children, then they give it to proportioned to their age.

MR. SPATT: Well let's assume that they would be - the ones who would suffer pecuniary loss, I'm not arguing that point now, my motion was made to the substance of that ruling to say it should not have

been allowed, therefore Move to Strike it.

THE COURT: No, I'll stay with it because I think it shows she is interested in the event and that can always be shown by a person whether or not they testify.

MR. SPATT: Your Honor, in taking judicial notice of the age of the child I also ask your Honor to take judicial notice of the age of the parents which is in evidence. I asked each one of them how old they were. I can get the two ages again.

THE COURT: I think they are in Answer to Interrogatories. Louis Weiner was born April 28, 1947; Barbara Weiner was born June 11, 1943. So that at the time of the accident they were 28 and 30, I suppose, respectfully. And today would be 33 and 31.

Mrs. Weiner's average expectation of life moment is 45.8 years, I expect. And Mr. Weiner's is 38.2 years, I guess.

MR. SPATT: Mr. Weiner is 38 today.

THE COURT: At least according to that one. How are they going, according to that one? Mrs. Weiner was born June 11, 1943 so I say that makes her 31. That's 46.7 according to that table. And Mr. Louis Weiner wouldn't now be 33. 38.5.

his grave or her grave.

MR. SPATT: I have no further motions, your Honor. Thank you very much.

MR. ZAWACKI: Your Honor, in conjunction with the discontinuance of the case against Mr. Weiner, maybe I shouldn't bring it up at this point but, your Honor has mentioned it, will your Honor now instruct the jury that tire is out of the case number one, no proof that was the tire on the car; number two, no proof if it was the tire on the car it had anything to do with the accident and in any event number three, Mr. Weiner is now out of the case; there is no evidence that Barbara Weiner knew anything about this tire.

MR. SPATT: I have no objection to that, your Honor. On the ground that the Motion to Discontinue against -- on the ground there is --

THE COURT: I had told you what it is. The grounds of unconditional reconsideration if post-prejudice, if Mr. & Mrs. Weiner are carrier to their peers.

What I have in mind specifically in that connection, what indemnification, implication, anything of that sort or anything having to do with

comfort, so forth and so on.

MR. SPATT: No nothing that I know of, your Honor about that.

THE COURT: Well, we don't know yet, we haven't finished with all of our thinking on this yet.

MR. SPATT: Well assuming that Mr. Weiner is not in the case, then I have no objection to that. If Mr. Weiner is in the case --

THE COURT: I really don't think the tire is in the case for a lot of reasons, you really have no competent testimony as to whether a tire that could in any respect be regarded as not sufferable. And because there isn't any evidence about the tire's age other than Weiner's testimony as he recalls it was bought the preceeding fall, so it was over seven, eights months old.

MR. SPATT: Your Honor is ruling that out of the case?

THE COURT: See, I want it to be clear about why we are getting it out because you see, if you think of the tire being defective then we don't really know who used this motor vehicle most of the time, who was in charge of taking it down to the service station, so forth and so on.

Now what we know for example, now that Julie had to go for ballet lessons, she was a member of the Scouts, so it's at least possible that Mrs. Weiner like so many wives who lives in the suburb spends a good deal of her time jockeying automobiles around while her husband is in the office. Quite possibly has a reasonable charge with automobile maintenance.

The fact he's out of the case doesn't really have too much to do with the tire.

MR. SPATT: If that's so I will not consent to that testimony but your Honor of course is free to strike it. But I am not going to consent to that.

THE COURT: Well I think it is surely speculative but there it is, it's in the case, I don't strike it simply because Mr. Weiner is out of the case. To put it right down to the last moment. When they changed drivers, I don't know whether Mrs. Weiner got out of the passenger seat, walked around the front of the car and got into the driver's seat or whether he got out, came around the front of the car and she moved over.

MR. ZAWACKI: Your Honor, I ask you for the other reasons I mentioned, not solely because he's out of the case, only because there is pictures in what jurors sometimes substituting - I hope they

Now the instructions or heading says,

are not listening nor they love to play detectives. Well, this tire doesn't look quite right to me, well they say that solves the problem, that is the clue to the mystery, that's why I think that since - I think we can all agree it's really not part of the case.

THE COURT: There, I'm not sure myself at all because frankly we haven't owned a car in several years. I'm afraid when we did we never knew what to do when something went wrong with it anyway. Except to phone somebody. Average American person with an automobile.

MR. SPATT: Average American lawyer approach to an automobile.

MR. ZAWACKI: One last thing your Honor. I assume the jury is going to come in now. Is your Honor going to clear the air about the absence of my friends here.

THE COURT: I'll just say that I better tell them the truth, hadn't I. Okay.

MR. ZAWACKI: Would your Honor indicate no inference is to be drawn by the facts that I remain.

(Whereupon the jury enters the courtroom at 3:21 P.M. and the following proceedings are

resumed in their presence:)

THE COURT: As you see members of the jury there has been a change in scenery here. At the close of the Plantiff's case, Defendants are entitled to ask the Court to rule on the sufficiency of the evidence presented. That was done in this case and I concluded that there was no competent evidence of action or inaction on the part of the Stones or of Greyhound Lines, Inc., which could be found as a matter of law to be negligence against - on that ground the action as against each of those is stopped.

Now that furnishes no basis for any inference of any kind as to the remaining Defendant Mrs. Weiner and I think when we come to the instructions on the law that will become more evident to you as to the difference in treatment.

All right, Mr. Zawacki.

MR. ZAWACKI: Mr. Barry Stone.

B A R R Y S T O N E, having been duly sworn, was examined and testified upon his oath as follows:

DIRECT-EXAMINATION

BY MR. ZAWACKI:

Q Mr. Stone, I am a lawyer, I represent the

Q Just take a look at this [illegible]

Weiners in this case, do you know who they are?

A Yes.

Q Now I am going to skip a lot of these preliminaries with you because we - with the exception of you and your wife, you have been here for a few days listening to the evidence in th[illegible] case. Now do you know what accident we are talking about?

A Yes.

Q And you were following the Weiner car, weren't you on Route 149?

A Yes.

Q And it was daylight; wasn't it?

A Yes.

Q Were you driving at about what speed?

A 40 miles an hour.

Q You had been on Route 149 for about a mile?

A That's correct.

Q Is that where you make the turn from Route 9?

A Yes.

Q So from the turn it's about a mile from where the accident took place?

A I would say so.

Q For that mile the Weiner car was in front of you?

shoulder into a snowbank

A Yes.

Q Going about the same speed you were going?

A Yes.

Q At any time during that mile did you notice anything unusual about the way that car was being driven?

A No.

Q You kept about - somebody read your deposition here - they told us how far behind this car you were. Whatever that distance was, you kept about the same distance behind that car?

A Yes.

Q Now at some point something happened to the Weiner car; is that correct?

A Yes, sir.

Q Did the Weiner car get caught in the slush on the side of the road?

A Yes.

Q That's an expression you used yourself many times?

A Yes.

Q You filed an accident report soon after this accident happened with the State of New York?

A I did.

Q Used the term, "got caught in slush"?

A I haven't seen it recently.

Q Right up against the snowbank which is deep

Q You take my word for it, want to look at it?

A May have said that, if it's written there.

Q I circled it there.

A Yes, "caught in slush."

Q You testified at a motor vehicle hearing; do you recall that?

A Yes I do.

Q In November of 1971?

A Yes, used more or less the same words. I believe I did, yes.

Q Can you explain to this Court and jury what you meant with those words, "caught in slush"?

A Basically what I mean, the Weiner car was proceeding down the road in an easterly direction and pulled over to the right-hand side of the road where the shoulder is and there was slush there and the front right-hand tire or actually right-hand side of car went into the slush and I don't know whether all of you are familiar with driving in snow conditions, but when you get caught in slush the tires have a tendency to continue in the same direction that you are in when you go into the slush.

Q There was slush on the right side of the road?

A Yes, on the shoulder.

Q I assume now what you are telling this jury

car.

when you - you have driven a lot in snow?

A Yes, I have.

Q Live in Vermont?

A Yes, I do.

Q Here is Plantiff's 1B in evidence. Is that a picture of a Volkswagen car after a period after the accident?

A Yes.

Q Unless is was moved?

A Unless is was moved after, I left the scene, the bus isn't there, so I really can't tell for sure.

Q Plantiff's Exhibit 1D in evidence. Is that your car after, appeared after the accident?

A Yes.

Q Had it been moved yet there?

A Not that I have knowledge of, no.

Q How about this one, different view of the same car referring now to Plantiff's 1B in evidence, same position?

A It would appear it had not been moved.

Q Now your car wound up on the wrong side of the road?

A That's correct.

Q Tell me, was there more slush, you were eastbound heading for Vermont?

A Um hum.

Q Was there more slush on your side of the road or on the other side, the side the bus was on?

A I wouldn't know.

Q You don't remember anything about that?

A No.

Q Let me ask you this: Referring to these pictures, 1D and 1B in evidence, Plantiff's Exhibits, do they fairly and accurately depict the condition of the roadway as it was just before the accident happened? I have now in mind there is snow or slush shown on the roadway; is that about what it was before the accident happened?

A No, I think there wasn't as much, it started snowing after the accident.

Q Well how long after the accident were these pictures taken, do you know?

A I have no idea.

Q This 1C in evidence, Plantiff's Exhibit 1C, is that you?

A Yes.

Q Well how long did you remain at the scene?

A I don't know.

Q Did you go to the hospital from the scene of the accident?

A Yes, I did.

Q And you didn't have any

were there before you left?

A No, I left with one of the policemen.

Q Let me narrow it down a little bit if I can. You weren't there three, four hours, were you?

A No.

Q It was a lot less time?

A I believe so, yes.

Q Something under an hour?

A I don't know, I left one officer standing, I went to the hospital with him.

Q The accident occurred close to 5 o'clock?

A Yes.

Q You have said I think dusk was approaching?

A Yes.

Q Now were these pictures taken - it wasn't yet dusk, was it?

A I'm not a - I don't know what flash attachments would make.

Q Wouldn't light the trees way back there, you know that. So how long after the accident were these pictures taken, can you give us any better indication?

A No, I cannot, I don't know.

Q Now when you say you didn't think there was that much slush or snow on the roadway before this

A Yes.

accident happened, that is because you say it started to snow after the accident; is that right?

A Yes, it had been snowing, prior to the accident, but not when the accident happened. It started to snow after the accident.

Q Now your car as best you can tell from these pictures - listen - I don't want to put words in your mouth. If what I say is not right you be quick to tell me, all right?

As far as you can recollect your car was not moved from this position in 1B before this picture was taken?

A It would appear my car has not been moved.

Q Now we don't see any snow on your car there, do we, the car hadn't accumulated any snow?

A No.

Q Would it be fair to say then if it snowed after the accident very little snow came down?

A I don't know, because is was fairly warm. I don't know what the temperature was but I think that temperature - it seemed the snow melted when it hit the car.

Q Can we agree on this Mr. Stone: These pictures were taken less than an hour after the accident?

A I think that would be fair.

Q The only difference in the roadway that you could observe to this jury is that the difference as shown in

these pictures as opposed to what was before the accident is some additional snow falling after the accident occurred?

A I would say there is more snow on this road after the accident.

Q Because of the snow falling; is that it?

A Yes.

Q This is my exhibit, Weiners Exhibit A in evidence. Is that the road you were traveling on, looking in the direction you were going before the accident happened?

A Yes, it is.

Q In other words you can see the bus coming the opposite way, that gives you a clue as to where you were going?

A Yes.

Q How about the condition of the roadway as it appeared in the photographs; is that about what it was before the accident took place, the same exception that you noted before that, that some snow might have fallen?

A I don't know. I would say that the exception of the snowfall, snowing, would make a difference, but I don't remember how much snow was on the road.

THE COURT: Can I see that, please?

Q (By Mr. Zawacki) In fact, Mr. Stone, I am referring now to 1C in evidence and 1B in evidence. On 1C you can actually see the snow falling there?

A This is C?

Q Yes.

A Yes.

Q And on 1B, we don't see the snow falling?

A I don't know if it's snowing there.

Q I don't know, the jury will have a look at all of these later, close-up. There wasn't any heavy snow coming down after the accident; was there?

A No.

Q Now you said before that the Weiner car pulled - I think you used the word pulled - to the right or turned to the right, might have used either one?

A Yes.

THE COURT: You don't know whether or not the wheels of that car were actually turned to the right; is that the impression you want to state - convey here?

THE WITNESS: As I was driving then, wouldn't observe the Weiner car in front of me, the car moved over to the right.

Q (By Mr. Zawacki) It went to the right?

A Yes.

Q As to whether the wheels were turned --

A I don't know why it went to the right, I don't know.

Q Now how about - let me ask you this: Did the Weiner car skid?

A What do you mean?

Q All right. We have a lot of problems with that. When I said "skid," when I ask you that question, I have in mind a car sliding, whether it is straight ahead, sideways, the word that I am concerned with, sliding, I'm not concerned about black marks left on a roadway. I am concerned about sliding wheels, rolling along; is that clear to you?

A I understand what you are saying, yes.

Q Is that what you would consider skidding, just what I said?

A I probably would consider skidding with black marks, sidewalks --

Q Forget the --

MR. SPATT: What was the last word?

THE COURT: Skidding, giving black marks.

THE WITNESS: Sideways.

THE COURT: Or sideways.

THE WITNESS: Car going sideways.

Q (By Mr. Zawacki) Let me ask you this: There were no black marks on the road after the accident?

A I didn't observe any but I didn't look.

Q Did the car go to the side, the Weiner car?

A The Weiner car went to side, it was snowing, diagonally across - as to whether the car was going sideways or not it appeared to me it was going directly across the road.

Q We know from a lot of witnesses the car seemed to go directly across the road at some angle into the bus. The question is as it was going across the road was it going straight or sideways?

A I do not know.

Q Just to clarify the sequence of events, whether it went to the right, for what reason we don't know and it was after it went to the right that it hit the large snowbank?

A Yes.

Q Besides whatever slush there was?

A Yes.

Q There was a large snowbank?

A Yes.

Q And after hitting the snowbank then it went across to the other side of the road?

A Yes.

Q So let me ask you the question again: Now we have explored what we both mean by skidding. Did the Weiner car skid?

A I don't know, I didn't see it skid.

Q You told me before you filled out this

accident report for the State of New York. There is a box on that accident report, box number 17. I will show it to you. It says, "actions of vehicle before accident. Check one box for each vehicle."

Now you look at this, see what I am talking about. That box there, check one box, one box for each vehicle?

A Yes.

Q That is your accident report; isn't it?

A It is.

Q It is your signature on it?

A It is.

Q What was the date you filled that out?

A That was on April 7, 1971.

Q Just after a month after the accident. I don't think you had spoken to any lawyers yet, had you?

A No.

Q You checked the box for vehicle number one which was your vehicle, you checked going straight ahead, didn't you?

A Yes.

Q Checked the box for vehicle number two, the Weiner vehicle going straight ahead, didn't you?

A Yes.

Q You checked one box for the bus going

straight ahead; is that right?

A Yes.

Q Now the instructions or heading says, "check one box for each vehicle."

Did you in fact not check two boxes for the Weiner vehicle?

A Yes.

Q What was the second?

A Skidding.

Q Was that based on what you saw?

A Must have been.

Q That filled out in your own handwriting?

A Yes, sir, on the 29th day of March, less than a month after the accident.

Q You signed another document and describe the accident, let me show it to you.

Is that your signature on there?

A Yes, it is.

Q Did you give a description of the accident? It's up on top, I should have circled that.

A Yes.

Q Is that before you spoke to any lawyers?

A Yes.

Q That description of the accident, did you say the Weiner car skidded?

A Yes.

MR. ZAWACKI: Thank you, I don't have any further questions.

MR. SPATT: Can I see that motor vehicle report?

MR. ZAWACKI: It's all up there.

THE COURT: They are up here Mr. Spatt.

MR. SPATT: Thank you, sir.

Can I have a minute to look at this, I have never seen it.

THE COURT: Yes, surely.

CROSS-EXAMINATION

BY MR. SPATT:

Q Did you say anything other than the word "skidded" in this paper which is some kind of Proof of Loss.

By the way this paper has to do with your property damage; doesn't it?

A I believe so, yes.

Q In other words when you have damage to your car you recovered that damage?

A I did.

Q Is that correct?

A Yes.

Q And in this paper did you say anything else

about the Weiner car?

A I don't recall.

Q Just take a look at this Mr. Stone, see what else before you said before the word, "skidded."

But before you said the word "skidded," what else did you say there? See if you can read it.

A "Lost control and skidded."

Q You put down "lost control and skidded"?

A Yes.

Q Well, did you put down "lost control" in Item 17 in your MVO 4. Did you put "lost control of the car"?

A No, I put "skidding."

Q Was there a box for "lost control"?

A No, there was no box for "lost control."

Q And would it be safe to assume if you can answer this, tell me if you don't understand. If there was a box for "lost control," you would have put that in there?

A Yes.

Q Of course that is in fact what happened; is that right, Mr. Stone?

A It would appear from what I saw in front of me.

Q It would appear this car lost control because it moved to the right onto the shoulder into the snow and against the snowbank; is that right?

A Yes.

Q And before it moved to the right onto the shoulder into a snowbank it didn't skid up to that point at all under any conditions?

A No.

Q Not even without any faintest - there is no doubt in your mind that regardless of how the car went across the road after it hit the snowbank or the guard rail - that before that time as it was driving it was driving under its own power and normally; is that correct?

A As I recall, yes.

Q And you were around a slight curve to the left; is that right?

A Yes.

Q And in that slight curve to the left, a car which is negotiating that curve has to turn with the road to the left; is that correct?

A Yes.

Q And are you familiar with the force of centrifugal force? I got it right that time. I think it means when you turn to the left which way does your car go when you are turning to the left?

A Wheels going left, car moves to the right.

Q That's where she went; is that right?

A That's right.

Q Right up onto the shoulder; is that right?

A That is correct.

Q Right up against the snowbank which is deep into the shoulder; is that correct?

A Yes.

Q Bounced off the snowbank which is right near the guard rail; is that so?

A Yes.

Q And then went diagonally across the road; is that correct?

A Yes.

Q When she went diagonally across this road she went straight across the road as far as you could see?

A As far as I recall, yes.

THE COURT: You mean in a straight path?

MR. SPATT: Yes, your Honor. On an angle, but in a straight path. You know what I mean?

THE COURT: Is that what you meant, Mr. Stone?

THE WITNESS: Yes, sir.

THE COURT: Not that she --

THE WITNESS: No.

Q (By Mr. Spatt) Let's make out that where the good Reporter is sitting is the bus; all right? And this is where the third juror with the green dress on, is the guard rail; all right? So, see if what I am doing is what happened.

MR. ZAWACKI: Now wait a minute, let's not do something with a chair, that is supposed to be a car.

THE COURT: Maybe if you could use paper clips on the table, is that all right?

Q (By Mr. Spatt) The bus remained -- the bus, the guard rail, the path of the car, previous, before it reached the guard rail, you are behind it, correct? Moved over to the right against the guard rail, against the snowbank, correct, and then went - this is a 45 degree angle toward the bus like this; is that correct?

A That's correct.

Q Of course the bus was moving up. Well, all right, withdraw that toward the bus; is that correct?

A That's correct.

Q Did you see the car when it bounced off the snowbank, slide this way, slide like this with the wheels leading east, did you see that?

A It appeared to me the car hit the guard rail, whether or not it shot --

Q Right across without sliding?

THE COURT: You might ask him were the rear wheels - using the --

THE WITNESS: It happened so quickly, sir, I don't know.

THE COURT: That's what I think he means, whether the front and rear wheels were using the same track or whether it was moving in such a direction that you would have seen four tracks instead of two. Is that what the idea is?

MR. SPATT: Yes, in other words, straight.

THE COURT: What is it, Mr. Zawacki?

MR. ZAWACKI: I don't know, I'm losing a lot of what's going on here, your Honor.

Q (By Mr. Spatt) What I mean is what his Honor said is that the car went straight across on a diagonal?

A It was my impression.

Q You never said anything in any deposition to the contrary; is that correct?

A Other than using the word sliding.

Q And when you went to the Motor Vehicle Bureau, that's what you said?

A Yes.

Q When you were asked under oath in this case, that's what you said?

A Yes.

Q And that's what you say now; is that correct?

A Yes.

Q Regardless of what's in any papers; is that what you say?

A This is what I recall.

Q And you are no longer in this case; is that correct, as a Defendant?

A That's correct.

Q You are here as a witness now; is that right?

A That is correct.

Q You have no interest in this case one way or the other?

A No.

Q You are telling it as you see it?

A As I recall it, yes.

Q As a matter of fact you described the roadway at the time of the accident as having spots or patches of slush; is that correct?

MR. ZAWACKI: Now I'm going to object to this if there are patches, if there is some testimony to the roadway I ask that he read it.

THE COURT: Did you say thus and thus? Then accurately --

Q (By Mr. Spatt) The question on Page 10, line 23, "What was the condition of the roadway with respect to whether there was any ice or snowing like that on this roadway?

"Answer, The road was wet with spots of

slush."

Did you say that?

A Yes.

Q Is that the truth as you are sitting here?

A Yes.

Q As you are sitting here recalling this tragic event; is that the truth, sir?

A Yes.

Q Spots of slush.

"Answer, Yes.

"How was the weather that day? Had it been snowing lightly before that, the time of the accident?

"It was clear, it started to snow again after the accident."

Did you answer that under oath at that time?

A I did.

Q Is that the truth as you remember it today?

A Yes, it is.

Q And in answer on Page 30, some other lawyer, different lawyer from the one that asked the first series of question.

"Question, Now you say in that area there were patches of ice on the roadway?

"Answer, Slush.

"Question, Slush?

vehicle travels about one and a half feet per second.

"Answer, Yes.

"Question, No ice?

"Answer, No."

Did you answer those questions at that time?

A Yes, I did.

Q And you never lost control of your car that day at anytime until after you were hit by the other car?

A After I was hit, yes.

Q Your car did not skid at anytime?

A No.

Q And you testified on Page 41, line 20, "Question, Was that car -- " and I mean the Weiner car -- "was that car skidding across the road at that point?

"Answer, I don't think so, no.

"Question, In a straight line?

"Answer, Yes."

Is that your testimony at that time?

A That's what I said.

Q Is that your testimony today?

A Yes.

Q Nor did the bus; is that correct?

A No, I don't think so. I don't remember about the bus.

MR. SPATT: No further questions.

REDIRECT-EXAMINATION

BY MR. ZAWACKI:

Q Mr. Stone, Mr. Spatt has just about asked you the questions, I don't want there to be any questions in the minds of this jury when you leave here.

Now, you maneuvered the cups around the chairs. When you agree as I guess you did with Mr. Spatt that this car went straight across the road, that is from one side of the road to the other, straight, that the bus at some kind of an angle, do you mean to say now that you want to disown the word skidding?

A I'm not saying I'm going to disown the word skidding, what I am saying, I explained this the best way I can from what I recall.

Q When you just gave that answer about skidding?

A I don't think so, no.

Q And that is your best quote, "I don't think so, no."? That was at a deposition when you were represented by a lawyer?

A Yes.

Q That was in September of 1972; wasn't it?

A Yes.

Q A long time after the accident; wasn't it?

A Yes.

Q I assume you agree with me that your

plaintiff, mean to use the elusive skid material here because recollection of this accident and the events that led up to it was better back in March and April of 1971 than it is now or that it was in September of 1972?

A I don't know.

Q You think now better -- you think that the reason skidding appears on those two reports are within a month because you were upset?

A I wouldn't venture --

Q Pardon?

A I wouldn't venture to give an opinion on that. I don't know.

Q You said you were upset, that is the answer to the last question. With you being upset, that has to do with the word skidding on those two reports?

A I don't know.

MR. ZAWACKI: All right, I have no further questions.

MR. SPATT: I have one or two, Judge.

RECROSS-EXAMINATION

BY MR. SPATT:

Q I notice in this MV-104, you have a narrative of the accident; is that right? It says somethings to check, you have to write the description, the apparent cause of the accident, is that it?

A Yes.

Q Did you put in that written statement of how the accident happened anything about skidding in that written statement, would you please read it?

THE COURT: In the narrative?

MR. SPATT: In the narrative, yes, sir.

A Concerning the actions of vehicle two, circled here?

Q (By Mr. Spatt) No, no. Description, read the whole description.

A Vehicle number two?

Q No, no, to yourself. Do you mention the word skidding in that?

A No.

Q That is the actual description of the accident in longhand; is that correct?

A As I recall at the time.

MR. SPATT: No further questions.

MR. ZAWACKI: I have no further questions. Thank you, Mr. Stone.

THE COURT: You may step down, Mr. Stone.

MR. ZAWACKI: May I read a little bit to the jury, your Honor, from the deposition of Mr. Brown?

THE COURT: Yes, certainly.

MR. ZAWACKI: I'm going to forget it, your

Honor, it's not important; the jury looks tired. I'm tired. That's it, the Defendants Weiner rest, your Honor.

THE COURT: All right, that completes the oral testimony in the case and tomorrow you will hear the closing arguments of Counsel and the instruction on the law and take the case under advisement.

So please do not discuss the case with one another or anyone not on the jury until it's finally submitted to you for your determination.

What happens between now and quitting time, we work, try to reach an agreement on the instruction on the law which I must disclose to Counsel before they sum up.

(Whereupon the jury leaves the courtroom at 4 o'clock P.M.)

(End of requested proceedings.)

(Whereupon the following proceedings were had:)

MR. ZAWICKI: Yes, your Honor, the one thing I failed to take up. I don't think it is too late. I offer this original accident report of the Greyhound people into evidence. Portions of it have been read to the jury already.

I don't see any reason and I still don't, of why all of it can't go into evidence. I see here 23 people insured or something, or 13 people injured. Maybe that shouldn't go in. Really, the only thing I am concerned with, and what I wanted to offer was this, was the box "skidding" that's checked off and really there is no need to take that, to physically go into evidence, because it can be referred to in our address to the jury. But on the back page, your Honor may recall there was quite a discussion with Mr. Brown about the box marked "length of skid marks."

Now, for the bus, he put down none for the Weiner car, he put down a hundred and four after crossing out five and crossing out fifteen and crossing out something else. So I would think that that kind of correction under the box "length of skid marks," would enable the jury to conclude, that there was considerable discussion about the length of the skid marks at the hospital or at some other place, and that this entry under heading "skid marks" was not just a haphazard entry or entry made because he was upset or under sedation.

THE COURT: All right. Impossible to tell what is

in there.

MR. SPATT: May I suggest, your Honor, --

THE COURT: There is one thing there that looks like 64.

MR. SPATT: May I suggest, your Honor, the testimony is in about that. We have had that, I think. I would object to any part of this going into evidence.

THE COURT: We have had the witnesses, a good deal of discussion about it. I am afraid we have to stay with that, Mr. Zawicki, because see, if Greyhound was in, that would be evidence only against Greyhound, not against the plaintiff.

MR. SPATT: I didn't think of that one.

THE COURT: What?

MR. SPATT: I didn't think of that one. I'll accept that, too.

MR. ZAWICKI: I remember what your Honor said before when somebody made the objection -- well, it's not binding on my clients, your Honor, it's binding on the world.

THE COURT: If it's so.

MR. ZAWICKI: If believed by the jurors.

All right your Honor, I am not going to argue the point.

THE COURT: I think all the facts are in. It certainly is one of somemore amazing circumstances that both Mr. Stone and Mr. Brown responded to the use of the term "skidding" not put

it in there contemporary narrative, but was it in Mr. Stone's contemporary narrative?

MR. SPATT: Neither Mr. Stone or Mr. Brown.

THE COURT: Neither in the narrative portions, any of the reports. And yet it is so solidly in the other things. It just isn't comprehens. ble to me. It makes you wonder now what in the world were they talking about.

Well, the other thing is, have we got the book?

MR. ZAWICKI: That's also true of the police report, the skid is in the police report. He disclaims when he testifies on the witness stand.

THE COURT: All right. I have given you the Charge, I suppose there is no objection to Pages 1 and 3?

MR. SPATT: Wait a minute, Judge, I haven't -- will you bear with me a minute, sir.

THE COURT: Sure.

Why don't you take a minute to pull your pages together.

(Pause in proceedings.)

MR. SPATT: I think we have it, Judge.

THE COURT: All right. Then we'll pull out Page -- you got Page 3 and 4, pull out -- did we have one about Greyhound in here?

THE CLERK: Corporation, 3A.

THE COURT: 3A, pull that out. You won't need that.

On Page 10, I would strike out four, because, the only contributory negligence here, would be that of Julie and I guess there haven't been any real arguments about contributory negligence. So that -- would you strike out the fourth and put an and in front of the third.

I suggest putting in 10A.

MR. SPATT: If your Honor please, also on Page 10 you will make that three elements, your Honor, a third line from the bottom?

THE COURT: I guess I better. I suggested 3A out to raise the question.

MR. ZAWICKI: Your Honor doesn't like the word substantial on Page 10, was a substantial factor.

THE COURT: Well, I don't know what the law is. You remember there was that big row and so what I have done is see, on Page 8, the last sentence.

MR. ZAWICKI: Still the word substantial does not appear.

THE COURT: No. Precisely not there.

MR. ZAWICKI: That big row was with the contributory negligence on the confusions of the word slightest with substantial, but we're not using slightest in this Charge.

THE COURT: Not at all.

MR. ZAWICKI: Any confusion, what could result.

THE COURT: Then, isn't the same thing true,and I

notice in the standard charge -- I am looking for the -- it has never seemed to make the least bit of difference whether you are talking about contributory negligence or defendant negligence. Particularly at present. When it really doesn't make much difference.

Page 206, I don't know where it is in the other, but he says, "An act or omission, proximate cause of -- if it was a substantial factor in bringing about the injury. That is, if it had such an effect in producing the injury that reasonable men would regard it as a cause of the injury."

MR. ZAWICKI: They then have to leave it for the last.

THE COURT: No. This I think, see, that would be in the supplement in there, I think. Back of the book and the way it comes up in the new edition is as I just read it to you.

1974 has been out for awhile. He uses substantial factor, all right.

Does it help any in our cause, if, see, if we can just say, "The sole factor in bringing about the harmful consequences, but it must be a substantial factor."

That is, have such an effect. That is on Page 8, third line from the bottom. It must be a substantial factor if that it is -- it must have had such an effect on producing the accident that reasonable people would regard it a cause

of the injury. That does it.

MR. ZAWICKI: Yes, your Honor.

THE COURT: Then on 10, we tuck in the word substantial and deny it.

Now do you leave 10 A.M. or want it out?

MR. SPATT: Your Honor, in getting back to 10, does it have to have substantial in there; isn't the law now"was a factor involved"?

You have substantial and proximate cause read in the Charge, but over here I don't think it ought to be.

THE COURT: Well, see, we use established factor and define substantiality on Page 8. So here I thought we could use the word, just say substantial fact.

MR. ZAWICKI: To be consistent.

THE COURT: To be consistent, really.

See, it does have, I think, you remember, there was this big question about distinguishing between substantial factors and substantial negligence.

Now, a slight kind of negligence would -- provided the negligence is slight, as it was, was a substantial factor in bringing about the accident.

MR. SPATT: Okay, Judge. I would request a more direct Charge, respectfully on the contributory negligence. Say that this, I charge you, that there is no contributory negligence in this case. That's not a factor in the case.

think I can read it to you.



Here you say no claim, herself, contributed to cause the collision.

THE COURT: But see, I haven't said anything about contributory negligence now.

MR. ZAWICKI: All right, I think you can even tear it up.

MR. SPATT: No, I wouldn't do that.

THE COURT: Well, there is a good reason for tearing it up. If we had to worry about anybody else's contributory negligence, so that that idea was in the case, fine, but we haven't said a word about contributory negligence now.

MR. SPATT: I would request you leave it in the way it is, your Honor, I think that would clear anybody else who gets an idea on the injury that may be, Julie Weiner could be.

THE COURT: Always thinking of the darest things.

Many, many, many years ago, my oldest daughter, then a little one, I was driving, we were driving along the road. And it was one of those automobiles, there was a space between the two front seats, so the children could come from the back to the front. And my daughter, Julie, decided she was going to come from the front and sit on her mother's lap, found it a little tight to get in between the two seats with her dolls, so in order to bring herself through, she reached out and pulled on my arm.

My arm was attached to the wheel, I went over to

the right, to the right, overcorrected, came across the road to the left and fortunately nothing was coming the other way, in the other direction.

But I'll die five years before my time.

So, is there any harm in saying it, I don't think so. The only other question, what's there now concerned only with the inner operations.

MR. ZAWICKI: I don't see any.

MR. SPATT: Maintenance.

THE COURT: What's that?

MR. SPATT: I don't think so. Maintenance.

THE COURT: I'll leave that out.

Can I leave Page 11 out altogether then?

MR. SPATT: I think it should be in, your Honor.

THE COURT: I think it explains in general terms something that you are going to go into specifically. I think it's a proper statement.

MR. SPATT: I would request that it remain in.

MR. ZAWICKI: Isn't that tailored for more than one defendant?

THE COURT: Yes, it's really tailored for several defendants and for plaintiff and defendant. That's what it's really addressed to. Where, they, you know, people have summed up to the jury in saying, if we were involved, we would only be involved one minimum. I don't see any reason it

couldn't be used in this case.

It doesn't say more than one person.

Page 8 tells us what negligence is. Now right after, to use Page 11, it is undue focus on the term negligence and the jury may be thinking about Page 8 when 11 is given to them.

I thought we ought to have it out because I think it is really for comparative negligence generally. And for its correcting for the many years that Judges and lawyers having charged juries too often remembering that the last time they were jurors they were told that contributory negligence however slight, is not enough to ruin you.

You've got to remember we have had jurors in here who say they have served in the State Court one of the other bureaus, every two years.

MR. SPATT: I respectfully submit, I think it should stay in because it does say the very negligence or very car lengths. It gives standards of reasonable care. And I think it is a proper statement of law which was not covered before, by myself, I don't say that. I think it is covered because as I say, I think this just deals with comparative, so I wouldn't put that in.

THE COURT: So 11A, you want to read that over first? Then we can start talking. Because this part is the part where we come down to specifics.

MR. SPATT: If your Honor please, I would respectfully object to that part where counsel also has agreed that a vehicle travels about one and a half feet per second.

First of all, I never agreed to that. Secondly, I don't think it is, I think it is not a proper part of the Charge. And if it were proper, it certainly would be for the benefit of Greyhound Corporation.

Since Greyhound Corporation is not in this case, I don't think that Charge should be available. It is not a Charge.

That statement of fact would be very persuasive to a jury, I think.

THE COURT: It goes out of the case when there is only one defendant left.

Is that what you are saying?

MR. SPATT: Yes.

THE COURT: No, I think so, because now the only question really is, crossing the road. No, I did have a computation of that here. It is 1.46666 until the end of time.

MR. SPATT: So you have taken out the middle part.

THE COURT: Yes.

MR. SPATT: I have no objection.

MR. ZAWICKI: Is that whole paragraph coming out that you have heard witnesses testify to?

THE COURT: Yes.

MR. SPATT: I have no objection to the rest of it on that page.

THE COURT: Who are the witnesses that we had to testify about the event?

Mrs. Stone?

MR. SPATT: Yes, Mrs. Stone.

THE COURT: Yes. A little bit, Mrs. Stone.

MR. SPATT: Harry and Janet, shall we put in, Judge?

THE COURT: I think so.

Now, you have not requested, but Mr. Levitt has, the emergency language, but I thought you might have requested it even if he hadn't.

MR. ZAWICKI: Well, I was reluctant to do so, your Honor, because there was no testimony by my clients as to the emergency. Now, I think the jury could infer from all the evidence and from the other testimony in the case that there was an emergency.

Having heard the testimony.

THE COURT: I think there was an emergency, the emergency we don't know what happened inside the car. She might have frozen, panicked, something, that she couldn't react quickly; some people who do, or she may have been asleep and startled awake when she hit the snow bank and the car twisted left. But too late to do anything.

So we really don't know what happened. Now, the other thing is, that we don't know yet how Mr. Zawicki and/or plaintiff, mean to use the elusive skid material here because if there is an emergency going on, lots of times you know all these people tell you about how you get out of a skid.

Being that you are supposed to do exactly the opposite of what your natural tendency is, that will get you out of the skid.

I have always thought that whenever I heard testimony, talking about it, my God, I hope I never go into a skid because I'll never be able to remember what to do, the unnatural thing, because it is the physically correct thing to do.

That is the only reason I can think of having it in there.

MR. SPATT: I personally -- I don't think this is the kind of case as it is now, without Greyhound, that emergency is an important problem because it had been a skid.

THE COURT: See, there is this: You see, we have here going across the road, then we have maybe, we don't really know, but I think, you may be right that at the very end, she hooked, see? Well, if the bus was still in the middle of the road, that may have been the last thing in the world to do.

Because, if the bus was one foot from the desired area, there would be four and a half, five and a half feet

between the bus and the guard rail. If on the other hand, the bus had already moved to the left, then there was every reason in the world for her to try to twist back to the right. But there is that uncertain evidence that at that point, someone in the Weiner car took action.

Now, it is fugitive evidence because there isn't any -- I mean for all we know, there is another involuntary trip on the part of the front wheel against the snow on that side of the road.

So, I just don't know. That is the only reasoning -- my first suggestion, Mr. Levitt is gone now, we can strike that out -- well, I thought, do we or don't we need it?

MR.ZAWICKI: Well, your Honor, aside from what your Honor said, when Barry Stone said she got caught in the slush, now I wonder if she did that in an emergency situation. If something is pulling her into a snowbank, I think that should qualify also under the rules.

So I think there is enough, your Honor, I don't see what harm was done by this.

THE COURT: I think if we assume she was conscious, then it was an emergency situation and her wheels caught in the slush or her right wheel caught in the slush.

MR. SPATT: Except for one thing.

THE COURT: He was confronted with the emergency, she did not deal with it effectively because she was asleep?

Page 209A goes into a good deal of using out-of-Court statements both to the motor vehicle bureau and in the report and on depositions of both parties and witnesses.

MR. ZAWICKI: Have we got the last 11.11 one?

THE COURT: That's what we should have.

MR. ZAWICKI: The driver has the duty, a driver is under care duty?

THE COURT: I'm sorry, what?

MR. ZAWICKI: Instead of using each --

THE COURT: Yes.

MR. SPATT: The same thing in the second sentence.

THE COURT: Now have we, you're laying up the vehicle in traffic law --

MR. SPATT: Yes, sir. I found that section that I was referring to. Do you mind if I sit down?

THE COURT: Not at all. You both have been on your feet a lot, so take it easy.

MR. SPATT: There is one section I see that I would request to Charge, that's 11A of the vehicle and traffic law.

THE COURT: What does it say?

MR. SPATT: 1180A, "No person shall drive a vehicle at a speed higher than a reasonable and prudent person under the conditions of having regard -- regarding the actual potential hazard, then --"1180B, "except when a special

hazard exists, that requires a lower speed for compliance with subdivision A of the vehicle marked -- no person shall drive a vehicle in excess of 50 miles an hour." Subdivision E,"the driver of the vehicle --"it shall coincide with subdivision A, driver at an appropriate speed when approaching and going around a curve, when approaching a hill crest, when traveling upon the narrow width of the roadway when the special hazard exists with respect to skidding in inclement weather or highway conditions."

THE COURT: That's 1180?

MR. SPATT: 1180A, B and E.

The other two have to do with school limits.

THE COURT: School buffers.

MR. ZAWICKI: Would the jury be permitted in this case, your Honor, to conclude that speed be made a part in the accident, I don't know.

On the basis of the record, should the jury be allowed to conclude that speed be made a part in this accident, there isn't any evidence.

THE COURT: Well, I suppose that's what all this centrifugal force was about. Mr. Zawicki?

MR. ZAWICKI: That's centrifugal or whatnot is true whether you are going five or fifty.

THE COURT: Not on that kind of pavement. In other words, I guess the argument is that you wouldn't have hit

the slush if she had been going slightly slower.

Because she, the car could not have yielded to the centrifugal impulse. I don't know.

MR. ZAWICKI: It doesn't make much difference, your Honor.

THE COURT: Now, you see the sections of the law are -- can you charge those as things which specifically imply to constitute negligence? I think not. Those, are rather standards of care, general precautionary statements. But they don't, like, say 1126A.

MR. SPATT: Correct.

THE COURT: Provide a definite rule.

MR. SPATT: It would be like an ordinance, your Honor, which is some evidence of negligence, but not necessarily per se.

THE COURT: Is it even that? It indicates to people -- to the jurors what?

MR. SPATT: Standardized.

THE COURT: Standards, the general standards of care are without involving any issue here.

In other words, they say, well, what do they mean by reasonable? If I have five miles an hour -- well, that explains that much. It means an actual -- which will -- it falls in with what Brown told them on the stand.

MR. SPATT: I don't know whether that is one of the

classifications you can Charge with respect to a statute.

THE COURT: What?

MR. SPATT: As I understand it, it's either the violation of a statute of a proximate cause of the accident, it is either negligence per se, what 1126, I feel should be. And, or, is some evidence of negligence which the traffic regulations --

THE COURT: Let me go over this again. All that section, 1180A, B and E, all they do is give you generalization. The issue in the case is, did the people act in accordance with the statute and it is the same.

In other words, it says, the driver will use care. That's all it really says. And it doesn't go into 50 miles an hour, whether it is easy, whether the road is traveled with cars or not, for heaven's sakes, or what people do, whether they are reasonably careful or not.

That's all that it really is.

Now, so if we put it in, I don't think, I could put it in as imposing a driver rule rather than expressing ideas about what careful driving is with relation to speed.

Now, see, in a way, it is repetitious of 11. 1. The first paragraph. And I would say thus the statute says and I will just read it to them, because as it happens, it is in nice neat language, isn't it?

MR. ZAWICKI: Yes, sir.

THE COURT: Then go on with the person confronted. HOw about that?

MR. ZAWICKI: Yes, I think that covers it fully. I hadn't recalled the language there.

THE COURT: Don't forget to give us your book back, that's what I'll get it out of. I don't have a machine at home.

MR. SPATT: Yes, sir. Are we now on 11.2?

THE COURT: Yes, sir.

MR. ZAWICKI: I thought 11.8 is out then?

THE COURT: See what I would do is, ask for the first paragraph on Page 11.1. I would just say thus the statute, statute 1180 provides -- and then I read A, B and E with some omission.

MR. ZAWICKI: Isn't it out on the next page, you're going to read the statute, you are going to -- violated that she was negligent.

THE COURT: Well, that's a different kind of statute.

MR. ZAWICKI: Wouldn't you have to get bogged down in explaining them? It might go over their heads. There is a vehicle and traffic law.

THE COURT: Let me fool with that, see how it edits out.

MR. SPATT: Are we now on 11.2?

THE COURT: There is where the trouble starts.

MR. SPATT: I object to it strenuously, the fairness in mind statute deals with what is -- my opinion is, that is not knowingly at all -- it is negligent or careless without knowing, knowingly means with intent or with deliberation or some of that nature.

I do not think that that is the law, the law is this is a prohibutory statute in my opinion, if you go over the line.

THE COURT: You are dead.

MR. SPATT: Dead?

MR. ZAWICKI: Might as well pack up now.

MR. SPATT: Except for of course --

THE COURT: Wait a minute, wait a minute now. That is where we come into collision.

MR. SPATT: With Koury?

THE COURT: As neither one of those cases was negligence on the contrary, they were told that they were free to find in absence of negligence.

Now, why would the Court, and by the way, Koury was argued by Judge Desmond and he knows the yellow line statute.

MR. SPATT: There is nothing knowing about Koury now, your Honor.

THE COURT: No, now wait a minute. These are very

difficult things because under 1126, violation is negligence and that would mean that I would have to direct a verdict for the plaintiff here.

If there was a violation of 1126A.

MR. SPATT: That's true. Except that the word knowingly I think is an improper word. I think what the statute says, what the charge says on the Pattenback Charge is, that in E, if a car goes over a center of the road that alone is evidence of negligence.

Merely by showing them -- unless there is circumstances.

THE COURT: Wait a minute.

MR. SPATT: In the whole case that shows she was negligent.

THE COURT: Go down to the bottom of the page. Which case?

MR. SPATT: Which case are you talking about, Judge?

THE COURT: Page 11.2.

MR. SPATT: That does not cure my opinion bearing in mind the statute with what is done knowingly.

THE COURT: I don't think you read it yet. Because it does on 11.3.

MR. SPATT: I'll wait a little bit. They handled it quite well in the old supplement, I don't now what it is in the new book, but it says -- I can read it to you verbatim.

THE COURT: 11.3A30, that one.

MR. SPATT: I still don't think that hits it, I think I can read it to you.

MR. ZAWICKI: Hits it enough, it will have me out of Court. What Mr. Spatt is saying, Mr. Pattenback, or whoever, expresses a safe auto, they have the burden of explaining why they came across.

Let's say they come forward, meet the burden, say well, this or that happened, a spider went into --

THE COURT: Now, they have -- they are doing all right except now Mr. Spatt would bury them again. No matter what you say, you still crossed the line.

MR. SPATT: I have no objection to that Charge. Proof that a vehicle came over on the wrong side of the road and caused damage, made out a prima facie case of negligence is subject to explanation for pending opinion. What is the subject to explain or putting the opinion? All the evidence in the case as to why they went across the center of the road. But starting again with this knowingly, this is not correct.

How can anybody knowingly just go on the wrong side of the road.

THE COURT: You are not thinking of me now. Please, please. Section 1126A is a very specific driving rule. Is that right?

MR. SPATT: Yes, sir.

THE COURT: It says"stay in your own lane and if

you cross over into the opposite lane that is negligence, period."

End of discussion, nothing can get you out of it. Plaintiff's contributory negligence but that's all you are liable.

Now, for that, is a quite different rule from I think, from the rule in Koury which does not refer to the statutory liability at all. But which independently of that says that if nothing more appears than that, the car is on the wrong side of the road, that alone is enough to get you to the jury. But they can explain away.

MR. SPATT: Yes, sir.

THE COURT: And the jury takes that into account, see, the language the Court conveys to the jury, that they could use that alone and then -- and that was error. Then down at the bottom of Page 349, under the Item, To the Court, it says the jury should have been instructed that the crossing over was a certain circumstance, a certain circumstance for their consideration in determining whether the driver had exercised reasonable care in the operation of the vehicle.

Even though that fact standing alone did not necessarily was a finding that he was negligent.

MR. SPATT: I have no objection to that, your Honor.

THE COURT: Now that's different from 1126A.

MR. SPATT: Yes, sir.

THE COURT: Which do you want, or both, or neither?

MR. SPATT: I respectfully --

THE COURT: Guess we have to stop. We can discuss this and then I will give you the language in the morning. And we can complete it on the record then.

All right, go ahead.

(End of requested portion of proceedings.)

(End of Trial Day.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

ALAN VANCE WEINER, :

Plaintiff, : 71 C 1177

-against- :

BARBARA WEINER, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

October 2, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR.,

U.S.D.J.

ILENE GINSBERG
OFFICIAL COURT REPORTER

Appearances:

ARTHUR D. SPATT, ESQ.,
Attorney for Plaintiff.

STANLEY ZAWACKI, ESQ.,
Attorney for Defendant.

- - -

were or were not able to testify -- three of them.

(The following occurred in absence of the jury.)

THE COURT: You still have a few questions on the Charge, and there were some things you wanted on the record about the Charge.

MR. SPATT: Yes, sir.

THE COURT: Let me get mine straightened out.

What I have put in or I have given you copies of, as you see, the 2:84 from the Pattern Jury Instructions, and where we left off last night, was we would consider whether the last paragraph on page 11.3A or 2.84 would be the better one to give, and Mr. Zawacki has expressed the view we could give 2:84 with confidence, since it was frequently used and practically boiler-plate and often used, and this, of course, was the Erie against Pennsylvania case.

Now, I think I have the right language. Is it legible?

MR. SPATT: Yes, sir.

THE COURT: Okay. -- Because that was on my home copy, which is really not very good.

Then, when it came to 1126A, I have attempted -- I Charged it straight from the book, as it were, on page 11.2. I have introduced the emergency and unusual circumstances exception with an additional sentence,

which counsel may or may not feel is correct, and I have then introduced a paragraph which I mean to be an instruction under the Coury against Safe Auto Sales, Inc.

Do you want to look at my Charge? That would give you the order of the pages.

MR. SPATT: I don't have to, your Honor.

THE COURT: Also, I have given you these calculations which I think cover all the business about distance, and that was so we don't go off the deep end.

According to the artthmatic, the degree of deviation, in order to cross the road, would be somewhere between 11 degrees and 15 degrees, and it wouldn't be anything like 45. If you stop and think for a moment, you will see if it were 45 degrees, i think that would have to be based on the assumption that the forward travel wasn't more than the width of th road from the guardrail to the point of impact, which would be in the 20's, you see. Then, that would be a 90 degree isosceles triangle standing on its side.

None of my arithmatic involved squares, because I got them out of Barlowe's Table of Squares.

MR. SPATT: You are not going to charge that to the jury?

THE COURT: No. That's so you don't go off the deep end on closing arguments. I wouldn't dare charge it, because I can never remember how to do square roots. I have to use Barlowe's Table.

These two pages, forgive me, are entirely mechanical, and I will meanwhile write out and give to you the short paragraph, and we will call that page 231A, which just says: If you find for the Defendant, you give your verdict in that form, and if you find for the Plaintiff, your verdict would be, "We find for the Plaintiff in the amount of dollars" blank.

MR. ZAWACKI: Your Honor --

THE COURT: Yes, sir --

MR. ZAWACKI: (continuing) May I just give you a very quick rundown?

I have done a lot of thinking, and just from thoughts I have had are, number one, I think that since -- I am thinking now about the entire photographs -- I thought there ought to be a specific instruction to the jury concerning this, because there is no claim in the case that the failure to maintain the vehicle in any way was the cause of this accident. I am talking about the pleadings and answer to interrogatories.

THE COURT: Well, I had understood from Mr.

Spatt that he wasn't going to make any claim with respect to tires.

MR. SPATT: Correct, your Honor.

MR. ZAWACKI: But if these pictures in evidence go to the jury, well, they have the right to infer the pictures are before them for some purpose.

THE COURT: I think mainly to show the extent of the damage of the front of the car from which an inference can be drawn as to the nature and extent of impact.

MR. ZAWACKI: Would your Honor say that?

THE COURT: I think you can state it in your Summation, and there will be no controversy over it. Is that right?

MR. SPATT: Yes.

MR. ZAWACKI: As far as 1126 and the yellow line, I think it should be out of the case entirely, and the rule stated in Coury and the Pfaffenbach case should be substituted.

These photographs, identified by everyone as being the scene of the accident, about an hour thereafter, show no double line. We can use the parallel of the new Charge in Pattern Jury Instructions when there is a stop sign obscured, missing or torn down. They then revert to the common-law rule -- assuming

there is no thru highway -- the car to the right has the right of way.

I think in this case, where there is no evidence that the Weiners knew about a double yellow line, or that it was obscured, or totally invisible, we should stay with the common-law rule as given to us by the Court of Appeals in those two cases.

THE COURT: I think that the way you have put it now, with the unusual circumstances qualification, will enable you to argue that fully to them, but you s-e, I think if I went wholly along with you, Mr. Zawacki, I would be ruling that there was no visible yellow line, double yellow line, and unfortunately, I don't think the question was put to, or answered by, any of the witnesses.

I agree with you a 100 percent on the pictures, that at least, in our review of them last evening, we didn't find any March 7 or 8 pictures in which you could see the darn line -- either the daylight pictures, or the evening pictures. But, I think I can do no more than to say that I think you are free to argue the evidence of the pictures under the unusual circumstances, on the theory that if you cannot see something, it's because it's not there. But, I think we have to remember that the vehicles in travel here had been traveling

the road, not just this part of the road, and they could project a continuation from the double yellow line where they had seen it earlier in their respective travels.

MR. ZAWACKI: The only evidence in the case concerning the double yellow line are the pictures. The witnesses were generally silent about it.

THE COURT: I don't think that's so.

You mean, there is no evidence in the case that there was a double yellow line?

MR. ZAWACKI: No. I think the Police Officers ---

THE COURT: Yes, I think so.

MR. ZAWACKI: In your Honor's revised Charge, "If you find that there was such a double yellow line" -- that doesn't solve the problem unless we say, "If you find there was such a yellow line that was visible." I have to agree with whoever contends there was a double yellow line -- Of course there was.

THE COURT: What do you say to that, Mr. Spatt?

MR. SPATT: I don't know. I don't know. I don't know what the effect of that is.

I know that in the Pfaffenbach case there was a snowstorm going on, and a single white line covered with snow. Because there was no double yellow line that statute did not come into play in Pfaffenbach.

So, I don't know.

Of course, we have testimony that the pictures were not the way the road was at the time of the accident.

THE COURT: No. There was that little bit of intervening snow.

MR. SPATT: So, I don't know what to say. I think I would go along with it the way it is, but --

THE COURT: Why don't you just sum up on it, Mr. Zawacki, and at the last moment, let's review this to see how it feels at that point.

I am a little scarey of it, because if I say something about "visible," rather than leaving it at large, I have to cover a mile to the west, and heaven knows how far to the east.

MR. ZAWACKI: I don't think we have here a curve, and a grade, and it might be that a mile to the east is a broken line is a broken line allowing you to pass. We don't care what the line was back there.

THE COURT: Yes, but here they are entering a curve, and we don't know where the double yellow line started -- we simply don't. I am just scarey of putting it in terms that take the issue away from the jury. I think I may not do that, meaning, I am

no authorized to do that.

MR. ZAWACKI: In the Charge: Failure to conform with that rule is negligence, if there was a double yellow line. There is no question there was a double yellow line.

THE COURT: Then, at the top of the next page, we allow plenty of room for reason to take over.

MR. ZAWACKI: I would not be so concerned with it depending on what the verdict is, if we had some idea how they arrived -- For instance, special interrogatory questions were used. If it is charged this way, and the jury slavishly follows "double yellow line -- failure to comply -- negligence" --

THE COURT: No. They are not authorized to do that in the Charge.

MR. ZAWACKI: On page 202 there is a reference to "The evidence includes the inferences reasonably to be drawn from the testimony which you hear and the facts which you find have been proved."

I would ask your Honor to Charge specifically that, number one -- I think your Honor covered this, but I wanted a specific Charge that they cannot guess or speculate as to what caused the accident. But, more important, since you mention "inferences," and "circumstantial evidence," on page 202, I would ask

your Honor to explain to the jury what circumstantial --

THE COURT: (Addressing Law Clerk) Get the circumstantial evidence Charge for the civil actions. Make sure it's not criminal.

MR. ZAWACKI: In P.J.I. there is a Section 170, and I would ask your Honor to Charge that as it appears in that Section.

What I have in mind, your Honor, is the rule in Manley v. New York Telephone, that when the evidence is susceptible to two interpretations, one consistent with the presence of negligence, and one consistent with the absence of negligence, the jury must accept that interpretation that accords with the absence of negligence, and it is given more or less in that way in the P.J.I. than anywhere else when circumstantial evidence is talked about.

MR. SPATT: I object to the Charge on circumstantial evidence because I don't think there is circumstantial evidence.

We have direct evidence in the case, and I don't know what circumstantial evidence counsel is talking about.

THE COURT: The circumstantial evidence is that we have no testimony from inside the car at all, and the inference of negligence here really arises

entirely from circumstantial evidence.

We saw the car cross the road, but that could be the fault of Chrysler Corporation; the last man who repaired the steering mechanism, and lots of other things.

MR. SPATT: I think that would be very speculative, and not an inference.

THE COURT: I'm afraid we cannot say that because you and I both happen to be able to think without an effort, of product liability cases on just such incidents.

MR. SPATT: But there is no proof of that here.

THE COURT: That's right. But equally, there is no proof of some specific act of negligence on the part of Mr. Weiner. For all we know, something untoward happened in an automobile in which there was a nine or ten year old child in the back seat.

MR. SPATT: Are you through with yours, and can I go to mine?

MR. ZAWACKI: Yes.

(continued on next page.)

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(The following continued to be heard in the absence of the jury.)

MR. SPATT: I respectfully request your Honor to Charge the jury in the language of the Pfaffenbach case, and specifically in such a situation, namely, when the car crosses the center of the road, a case of negligence is made out, prima facie, sufficient to go to this jury.

The explanation of the defendant, if he gives one, will also usually be for the jury.

The same rule, open to additional factual evaluations of responsibility of events would apply to the passenger in the car, which goes out of control, and that Charge is set forth in Pattern Jury Instructions -- I will withdraw that because you have really covered that.

THE COURT: I think the paragraph at the top of 11.3A -- and I don't like the language of Pfaffenbach--

MR. SPATT: I ask for a separate Charge as to a car leaving the road and striking the guardrail, which is a separate, independent act on the part of the driver of the car or vehicle, and that is specifically covered on page 246. It says, "The fact that defendant's motor vehicle left the road and struck a specified object" -- here, a tree; in our case the

cute. What's that worth?

guardrail -- I believe the proof here substantiates it a 100 percent, and I request your Honor to make that additional Charge. That is 246 of the Pattern Jury Instructions, your Honor.

THE COURT: Well, what do you say to that, Mr. Zawacki?

MR. ZAWACKI: Your Honor, on page 11.3a --

THE COURT: What page is that?

MR. SPATT: Page 246, that specific Charge on the vehicle leaving the road.

Of course, it says it that way, but I have no objection to saying it your way.

THE COURT: That's 2:84a, which would be in the Supplement.

MR. SPATT: Would you like to see this one, Mr. Zawacki?

THE COURT: It's the "hitting the tree" one.

MR. ZAWACKI: Mr. Spatt has been asking you to Charge that a car left the road on the right side, struck the snowbank or guardrail, and that they might infer this and that, and now, going to number two and the fact that the Weiner car crossed the road, they may infer -- and your Honor covers it on page 3a, "The Weiner car crossed the center lane."

If Mr. Spatt isn't happy, then we can make it

the fact that the Weiner car left the road and went to the right, and I don't see the need to Charge it twice.

The fact that the Weiner car left the road on the right and crossed the center line, I have no objection to that. We did that.

MR. SPATT: I think it should be two separate Charges.

THE COURT: We can go on like that forever -- that this and that could be negligence, and this is not.

I think Mr. Zawacki's suggestion is well taken; that there is no desire to state that there are hedges all along that the defendant must clear when the fact of the matter is that the plaintiff has the burden of proof, and the defendant has not.

Now, at the top of page 11.3a, "The fact that the Weiner car crossed the center line into the path of the bus, if you find that to be the fact, is evidence from which you may find that defendant was negligent. Similarly, the fact that the Weiner left the roadway on the right and struck a snowbank or guardrail, if you find that to be the fact, is evidence from which you may find that defendant was negligent. However, neither fact, standing alone,

nor both standing alone, requires you to find that defendant was negligent," et cetera, et cetera.

MR SPATT: No objection to that, your Honor.

MR. ZAWACKI: I have no objection. It's fair. She did it.

THE COURT: Now, you want the equal balance page. Do you think there is a page that sufficiently deals with burden of proof?

MR. SPATT: I was going to ask for that -- burden of proof.

THE COURT: You know, it would have been so charming if you mentioned all this. The whole point of my making the Charge available to counsel on the first day of trial, as to all of these things, and bringing in fresh pages as soon as the evidence warrants it, is so that counsel will pay some attention to it, and not leave the jury waiting in the wings.

MR. SPATT: I must apologize. I didn't realize that wasn't covered, and it is covered on page 37 of Pattern Jury Instructions in a death action, and I ask your Honor to specifically Charge that language. It is the second paragraph on the page.

THE COURT: Now, the death action Charge is appropriate to the circumstances in which the decedent is the beneficiary. I hardly think it is appropri-

ate here, where there were four passengers in a car. It is an issue for the jury to determine whether they were or were not able to testify -- three of them.

I think you can argue with a certain liberty from the fact that the defendants were unable to testify. The operator of the motor vehicle is unable to testify, which puts you in a special position. But, I don't think you can go beyond that, and indicate an entitlement to a special Charge, and I decline to give the Charge in P.J.I. 1:161 in the second paragraph, first line -- first sentence, rather. That's the one you want?

MR. SPATT: Yes, sir, and I take exception.

THE COURT: There is a typographical error in it -- "an injured plaintiff," it should be.

MR. SPATT: I will have to send a letter to Judge Meyers.

THE COURT: Now, if the evidence is not of every kind and description, then the Plaintiff loses.

MR. ZAWACKI: Of course, that is correct. But, I say here, the jury is faced with the car running off the right side of the road. Question -- Did a negligent act of Mrs. Weiner cause that?

THE COURT: I don't think I can give that. If that arguably is as consistent with innocence as guilt,

they must find innocence. But, isn't that exactly what Coury forbids us to Charge?

Coury says we don't give a darn whether it is susceptible of innocent explanation or not. The explanation is not in fact forthcoming. The jury gets it.

MR. ZAWACKI: I see the point clearly, and I am going to withdraw it.

That doesn't affect the evidence being equally balanced. Will your Honor Charge that?

THE COURT: Yes, that's what I've got right here.

Of course, we won't Charge the last part of the page.

MR. SPATT: I have a continuing objection, and request to Charge page 37, second paragraph.

THE COURT: Which I have flatly refused to do for reasons stated.

MR. SPATT: Yes, sir. I just want to make it clear --

THE COURT: Yes. I think as a matter of fact, we have to remember after the jury retires to review--

MR. SPATT: I have only one other thing to go over -- two other things -- and one I respectfully except, and I will do it at the end of the case -- but

I just want to apprise your Honor of my objection to your Honor limiting the future earnings of the child to the period of the minority.

THE COURT: I understand that is the law.

MR. SPATT: I have been in cases where it was Charged otherwise, but I have no law to give you.

THE COURT: There are cases that deal, speculatively, and far down the road, with a money-earning child of minority, who can be required to support his or her indigent parents. But I hardly think we have anything in the evidence here that warrants the giving of a Charge along those lines, and the normal rule is that a child, whether emancipated or unemancipated, turns its earnings over to the parents, and they can take that into account at least during the minority of the child, but that's all.

MR. SPATT: When we discussed this subject, we were off the record, and I mentioned to your Honor -- I asked you to rule on the subject of Mr. Zawacki's mentioning, in Summation, that the parents, at least the mother, would benefit from the wrong, or that the Bible or Talmud or some greater power than here says that one may not profit by his own wrong.

THE COURT: Yes, and I instructed Mr. Zawacki that he must not in any circumstances sum up in those

tyrms, because the law is, as we find it, that the plaintiff-administratrix is in this action entitled to recover the damages as charged, quite without reference to the fact that Mrs. Weiner is a beneficiary of the recovery in part -- not the sole beneficiary -- and that it is her loss -- that in part measures the recovery, and that the sole charge in the case is of her negligent operation of the motor vehicle, and I think Mr. Zawacki understands and protests that.

MR. ZAWACKI: I do.

MR. SPATT: When the Reporter had to leave, it was very late in the afternoon, early evening, I might say, and I respectfully requested your Honor to affirmatively Charge the jury that there was no difference in the duties owed to the child passenger or, as I said it there, that the estate of the child has an absolute right to sue the owner or operator of the vehicle, though it was her mother driving the car, and there was the same duty between the passenger and the driver of the car as in the case of a stranger, and I specifically request your Honor to Charge the jury to that effect.

THE COURT: Well, the whole Charge, I think, does that without putting it in precisely those terms.

Now, I think we had better have the jury order

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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ALAN VANCE WEINER, :

Plaintiff, :

-against- : 71-C-1177

BARBARA WEINER, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

October 2, 1974
10:00 o'clock a.m.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

(Excerpt: Summation of Stanley Zawacki)

ILENE GINSBERG
ACTING OFFICIAL COURT REPORTER

Appearances:

ARTHUR D. SPATT, ESQ.,
Attorney for Plaintiff

STANLEY ZAWACKI, ESQ.,
Attorney for Defendant

- - - -

(Jury entered jury box at 11:30 a.m.)

THE COURT: Mr. Johnson, would you please take the seat of juror number eight.

All right, Mr. Zawacki.

MR. ZAWACKI: Thank you, your Honor.

May it please your Honor Judge Dooling, Mr. McField, ladies and gentlemen and Mr. Johnson, I welcome you to the jury now.

This is the time in the case when lawyers are permitted to talk, to address the jury directly and to argue, I guess, our case; talk to you about the evidence.

I assume you know now we are not permitted to do that when we examine the witnesses. Some lawyer will say, "that is argumentative," or "the picture speaks for itself" so now, is the time to argue and show you pictures.

First, I want to thank you all for the attention you have given to the case. You were in and out, back and forth and you were excluded from our discussions with the Judge as to the law and you were patient and I thank you all, not because I think that if I'm nice to you, you will be nice to me, but I thank you because I am the first one up here and I assume any other lawyer who is the first one up here would do it also.

This is a difficult part of the case for me because I am younger than some of you and yet I have to stand up here and more or less give you a speech and talk at you. I don't like to do that. It is uncomfortable. So, I'm going to ask you if we can talk about the case as though we knew each other or as if I were a guest in your home or you in my home and we were discussing the case objectively, not as a lawyer talking about a case, but objectively, just having a cup of coffee or something stronger if you like, just discussing what we have seen.

This is not our ordinary run of the mill case. It is referred to sometimes as an accident case and I'm sure you have heard about accident cases and whiplash and what happens and what is supposed to happen.

This is an accident case, a negligence case and his Honor, Judge Dooling, will give you the law at the end of the case. You are not expected to be lawyers and know all about the law. You are expected to follow the facts and be able to come to some agreement as to the facts in the case and then at the end of the case Judge Dooling will have all these doors locked and no one comes in or goes out, I guess, and he explains the law and then your task should be fairly simple.

You simply apply the law that Judge Dooling gives you to the facts as you find them and you come up with your verdict. But as far as the facts, again, that is solely your job. No one can tell you what the facts are. I cannot tell you what the facts are, Mr. Spatt cannot, Judge Dooling cannot -- you must decide the facts for yourselves.

In this case, as I said, we have a negligence case and you won't be surprised too much when Judge Dooling tells you what negligence is. He will give you the law, but it is not going to surprise anybody. It is just the want of care; of doing something reckless or foolish. But don't take my definition. You will hear Judge Dooling's. It may be refined by Judge Dooling, but plain and simple, that's it.

We have now the estate of Julie Weiner suing and charging negligence. She looks at her mother, or Barbara Weiner, who was the mother, points her finger and says, "You were negligent."

The finger has also been pointed at Greyhound and Mr. Stone. They are out of the case. Judge Dooling has decided that no, as a matter of law, they are not responsible and I don't disagree with that.

I've heard Mr. Brown, the Greyhound bus driver.

There was a bit of confusion about that eight hundred feet. I had been under the impression that he saw this car eight hundred feet away get into trouble and I thought he should have done something. But the police officer took measurements. We know the Weiner car got in trouble when it went off the side of the road. From there it traveled about one hundred four feet and there was the accident.

The Greyhound man, Mr. Brown, saw the car get in trouble one hundred feet away and he had not much chance to do anything. He said he pulled to the right, stepped on the brake. What can we expect of him? He did what he could. I would tell you that if he were in the case right now.

Mr. Stone, what did he do? He is a victim of circumstances driving down the road. An accident happens in front of him. What can he do? What can you or I do? He is out of the case and I agree with him.

Now, Mrs. Weiner is in the case. She is charged with negligence. You must decide is she guilty of negligence and I will talk to you about that.

I hope I am not a long time with you. I don't want to be.

It's a simple case and I'm sure you don't like

obvious questions of witnesses, "where did you start out", or "what did you have for breakfast?" Was it Shakespeare or Mark Twain who said, "Let's kill all the lawyers"?

Let's get to the heart of the matter. I want to talk to you about this type of case, a death case.

A little girl is dead. The teacher was here and we have heard the school record. There is no question about it. Julie was a bright young girl. We've got her picture here. You will see the pretty young girl; smart, above-average. The teacher says, "top one per cent" and I agree with that. Everything the teacher said I agree with. But, it's a little insulting to have the grandmother take the stand and say to her, "What did you think of your granddaughter?" We know the answer. Mr. Spatt doesn't have to bother to talk to you about this girl because there's no question about it. She was a top girl. She was personable, I guess, smart.

Now, what is the life of a girl like that worth? Well, is a million dollars enough? No. Ten million dollars -- give her everything -- that couldn't compensate anybody for the loss of a girl like that.

Maybe you've got children, one not so smart, but

cute. What's that worth?

We are not here to talk about sorrow. What is the sorrow of the parents worth? Mental anguish, their feelings? Their loss of companionship? You cannot put a price tag on it. The law doesn't let you do that. The law is strict about the damages in a case like this. Maybe it's hard and fast. You might say it's cruel -- I don't know -- but the law says what you get back in damages is medical bills, hospital bills and you can get back the money lost to the next of kin, the parents. That's what you can get in a case like this.

(continued on next page)

Now, you have a death case where let's say you have a working man and he earns X amount of dollars per year and he is killed for some reason. The wife brings an action. Here is a man earning $10,000 a year with 40 years to live, say, 40 years to work and you multiply 40 times 10 and you get $400,000.

If a mother is killed you give the father what it would cost to hire what they call, coldly call, a substitute mother.

But a case such as this, you are allowed medical expenses, hospital expenses. You are allowed the amount of the monetary loss, the money lost which goes to the next of kin, who is the mother and father.

Perhaps, you will think I am hard the way I am going to talk to you but here's a girl 10 years old. I don't make the law but listen when the Judge gives you the law of damages -- if you ever get to the question of damages and I don't think you should or will but it is part of the case and I can't ignore it. The Judge will charge you on damages. He doesn't suggest that you bring in a verdict but it is involved in this case.

What was the money lost to the parents because of the loss of this girl? She had a potential for

higher education. You send her to a dentist and buy her clothes and pay the bills. You send her to private school. You pay the bills. Her father is an engineer. I don't know -- do you buy her a car to get around in college? I suppose you pay the college tuition. More clothes. Ballet lessons. Brownie uniforms. You pay the bills. What do you get back?

Here is a father, an engineer who has a good job, I guess, in Alabama. He moved down there. What money do they lose? Take a hard look at it. It is not pleasant but ask yourself, what money do the parents lose because the girl's gone? There is no award for hurt feelings or loss of companionship. You cannot put a price tag on that.

From what you heard would you expect this girl to go out at 16 and work and support her parents in any manner, shape or form? No.

If you figure it out, Mr. Spatt will get up here and say, "Well, according to Mr. Zawacki the parents of the child should pay the one that caused the death because it saves the money. You don't pay for the dancing lessons, dentist bills and college tuition."

Again, I don't make the law but if you consider

damages and I don't think you will -- but this is for your information -- this is the measure of damages.

You cannot guess or speculate that she might have been an actress and gone out and made millions and given her parents a million dollars.

Let's use our common sense. This girl -- the loss of this girl to the Weiners is not a money loss, not a monetary loss and that's all they are entitled to get.

Now, if there was a verdict in this case, a money verdict -- of course, I should say that also to be considered in a case like this is the condition of the parents. If you've got a bright young boy or girl who was killed but you've not got an invalid parent not able to take care of himself -- here's this bright young boy or girl who is going to take care of his parents -- but we don't have this situation here. The father is an engineer. He is not looking to the daughter for any support.

If a verdict were rendered in this case the question is, who gets the money. It is not a mystery. It doesn't go to the American Cancer Society or the Red Cross. It goes to the parents -- no ifs, and, or buts. It doesn't go to the boy Allan.

So, these are all considerations for you to think about and talk about.

You see, usually, in a negligence case somebody goes through a stop sign and hits somebody and somebody breaks his arm.

Now, the fellow went through the stop sign, did something wrong and the law says he must pay the fellow whose arm he has broken and that's right. No question about it. The man can't go to work with his arm. He's got a pain in his arm. He is suffering. That is proper, correct and it is the law.

In this case -- and I'm glad Grayhound is gone now and Mr. Stone is gone because it makes the issue much clearer because it removes some of the diversions in the case -- in this case, the only way there can be a money verdict is if Mrs. Weiner caused the death of her daughter; if she was negligent and did something wrong. If so, and you so find, then there shall be a money verdict and as I said, who gets the money? Mrs. Weiner and Mr. Weiner, both parents.

Maybe there are questions in your mind. This is not a two-way conversation. You can't ask questions and I can't give you answers now. All I can say is this: Some of you are older than I. You have been

around a long time and when you decide this case I ask you to draw on all your experience, everything that's happened in your lives and take into account all the things you have seen. Use all your experience to decide this case. You are the conscience of the community here. You have to do what is right within the boundaries of the law you get from Judge Dooling. I don't ask you to do anything except what is right in this case so with that, as a way of introduction and explanation to you -- and I don't think Mr. Spatt will contest what I have said about the measure of damages and who gets the money because we know --

MR. SPATT: I object to that in that I think there are additional measures of damages Mr. Zawacki has not gone into.

THE COURT: Well, that's another matter but the point is, it is a pecuniary loss plus the medical and hospital bills.

MR. ZAWACKI: Now, we turn to the accident.

There is going to be talk here, I imagine, I assume, about rules of the road.

Now, very generally, the term negligence means, did you do something wrong. How do you decide if Mrs. Weiner was negligent?

Well, you ask yourselves, what would a reasonable driver have done? Put yourself behind the wheel. What would you have done under those circumstances? That is one test.

There are rules of the road and his Honor will tell you what the rules of the road are and all drivers are supposed to follow the rules of the road and I guess one of the rules of the road you may hear something about, probably from Mr. Spatt, is the rule that we all know and don't need anybody to tell us about and that is a double yellow line and that you must keep to the right.

In fact, we don't need a double yellow line on a road like this to tell us to keep to the right.

We have been passengers in cars, I am sure, and we know we have to keep to the right on our side of the road. There is no question about that and no question about the fact that when this accident happened Mrs. Weiner was on the wrong side of the road.

Mrs. Weiner was behind the wheel. The car went over, struck the bus and I think we all agree -- but it doesn't matter if we don't -- Greyhound is not responsible and Mr. Stone is not responsible.

Question then, are we responsible?

Well, if you are technical and apply the rule that you cannot cross the line in the center of the road, if you want to apply it technically, I might as well sit down and pack up my bags and go home and I have lost the case. That is, if things worked that way.

Just as Judge Dooling said Grayhound isn't responsible and Mr. Stone isn't responsible he can say Mrs. Weiner is responsible --

MR. SPATT: I object to that.

THE COURT: I think what is meant is that if there is no controversy the Court in a civil case at times can instruct the jury that a defendant is liable but that's only where there are no conflicting inferences to be drawn from the evidence or the evidence itself is not in conflict. But that is not this case.

(Continued on next page.)

MR. ZAWACKI: (continuing)

The fact that this case is being presented to the jury for your deliberation and verdict means there are questions which only a jury can decide.

Now, there is no question that the Weiner vehicle went off the road to the right and then over to the left side. The question, however, isn't so simple that therefore, the Weiner vehicle is liable and a sum of money should be paid to the mother and father. That is not the question. The question is why -- why did the Weiner vehicle go off the right side of the road and over to the other side?

I don't have to tell you why, because it is the plaintiff, the one who does the suing, who has the burden of proof. I don't have to solve the mystery. The plaintiff brings this case and has the right to talk to you first and last, which he will do in a little while, and then he must prove this accident happened because of the negligence of Mrs. Weiner, showing that the car went over the line, the center of the road. However, that in and of itself is not enough and logically so. What if something went wrong with the steering mechanism of the car? Is that Mrs. Weiner's fault? What if something flew in to the window and blinded her? Is that her fault? What if she had a

sickness, illness or seizure? Is that Mrs. Weiner's fault? We have to decide why the car went to the right, over to the other side of the road.

Now, very interestingly, the police officer -- and I'm not going to read his testimony because I don't think from any of the reports or from any of his testimony -- I don't think it's good to pick out little bits of testimony and point them out to you, but we can agree that the police officer, on his report, checked off "skidding."

Mr. Stone, on his report, checked off "skidding" and on another piece of paper he filled out, he checked off "skidding".

The bus driver, on his report, checked off "skidding" and under the heading "length of skid marks" he had "one hundred four feet" after there were crossings out, fifteen feet was crossed out.

It's reasonable to me to assume that these people, participants in the accident or who got on the scene right after it happened, used the word "skidding" -- each and every one of them. No question about that.

I would assume that the Weiner car skidded, but then I see during this trial when these witnesses testify in person, they want to get away from it. When

they testify at these depositions represented by lawyers, they want to get away from it. Mr. Spatt wants to avoid this question of skidding, like the plague.

He says to Mr. Stone, "You didn't put that in the narrative, did you?" And to Mr. Brown: "When you checked off skidding, you were in pain, under sedation. Did you check that or somebody else?"

Why is that? I guess it is because this country road -- if Mr. Spatt disagrees that's fine, but it is a country road -- I guess because this country road was in horrible shape. That is very important and I'm sure Mr. Spatt will point out to you there was no ice or slush, just spots of ice and slush and is that very important to the case? Well, I don't know.

This road was in bad shape. Mr. Stone told us why the accident happened -- because she got caught in the slush and I fell into the trap too and started to ask Mr. Stone what happens when the tire gets caught in the slush?

Well, it slows down the right tire, in this case and you are turning in that direction and you are pulled that way and Mr. Stone told us that's what happened here. He said a car got caught in the slush.

Mr. Brown said why the car went to the right. Mr. Stone gave us the answer to this problem. He said over and over again -- there's no question that he said it -- the wheel got caught in the slush.

If the wheel got caught in the slush -- and there's no evidence that it did not and Mr. Stone alone helped us on that point -- if the wheel got caught in the slush and got pulled to the right involuntarily, Mrs. Weiner, behind the wheel, finds her car getting pulled to the right by the slush and thereafter hits a snowbank and the car skids, did she do something wrong? I don't think so. It could happen to you or anybody and Mr. Spatt, being aware of all this, wants to avoid the skidding, as I say, like the plague.

I don't know if he is trying to convince you that she turned her wheel then drove into the right side of the road and then turned the wheel and drove straight into the bus.

The important thing isn't that she left the road and went to the other side and we concede that, but the important thing, is why?

Well, I know two people who can tell you why. In the usual case, Mrs. Weiner could tell you why. "Why did your car go to the right?"

Well, she has amnesia. She was knocked unconscious, as well as the husband. The boy, Allen, doesn't know. They can't tell us.

What do you do with that kind of testimony? You can't do anything with it. This isn't a situation where you guess or speculate as to what happened. You can't go back to the jury room and say this or that happened. You must decide this case based on evidence. So, they don't help us with the problem.

I think the best or the most help we get is from Mr. Stone.

Mr. Stone tells us that the wheel got caught in the slush and I think it is logical.

After the accident happened, we all know that some snow was falling, not a blizzard or big storm, a few drops or flakes were falling and as Mr. Stone told us, the accident happened 5:00 in the afternoon. It was still light when these pictures were taken. Mr. Stone was still at the scene and this photographer, whoever he was, got there pretty quickly and this is more or less -- and I say "more or less" -- this is how the road looked when the accident happened. Perhaps a few more drops of snow fell, but basically this is how the road looked.

Mr. Spatt says the car went over the double yellow line. Where is it? Do you see it there? Do you see any double yellow line? The following day, March the 8th, do you see the line there (indicating photograph)? I don't know where it is.

I don't think Mr. Spatt is going to argue, technically, with you about a double yellow line, car over the line, therefore car is responsible, but if he does, a double yellow line has to be visible.

A double yellow line. These people were from New Jersey. They were never there before. Barry Stone wasn't sure. The bus driver wasn't sure.

Let's not decide the case on these technicalities because I'm conceding to you all that a car's supposed to keep on the right side of the road, on its own side.

As far as the slush, this is an interesting picture. I guess this is the view Mrs. Weiner had just before the accident. There's the bus parked there. It hasn't been moved -- maybe pushed back in the accident-- who knows -- but it's not been moved much.

The car got into trouble one hundred four feet from the bus or thereabouts so this is a good view of what Mrs. Weiner must have seen before her car got into trouble. This is what the road looked like. Do you see

the side of the road the bus is on? That's the car coming from Vermont to New York. Do you see the slush? Remember, this Volkswagen wound up on the side of the road the bus was on.

Look at what Mrs. Weiner was confronted with on her side of the road. Look at that big puddle there. I didn't put it there. This is what the road looked like.

I think we can safely assume that these pictures taken shortly after the accident shows the roadway and that it looked similar before the accident. Traffic couldn't go past there. It was blocked there. No one could get by there and create a puddle and this is what Mrs. Weiner was confronted with. Remember, she's got to keep on her side of the road. That's the law.

We can see a little bit of slush on the side of the road the bus is on. Look at her side. Look at that slush and the condition of the road. What could she do? She's driving along, sees the puddle on the roadway and all that slush -- what do you do? Well, you put yourself behind the wheel. Can I get around the slush puddle? Can I get around it? That's probably the safest thing to do, if you can do it, but here's a bus coming. Are you able then to pull around the slush

or a puddle like this when a bus is coming on a narrow two-lane road the other way? You can't.

Do you step on your brake and stop? What about Mr. Stone who is driving behind you and who will hit you? I guess you have to keep going.

Was Mrs. Weiner speeding? Mr. Stone said no. He said he was behind her for a mile. Was she tried or intoxicated? We don't know. There is no evidence of intoxication. Was she tired? I don't know. We can't guess about it.

How was her driving before the accident happened Mr. Stone told you he followed the car for a mile.

"Anything unusual about the way the car was driving?

"No.

"Did the car have its headlights on?"

He wasn't sure.

"Did the car need the headlights?

"No. It was daylight."

So far so good. Mrs. Weiner has done nothing wrong yet.

(continued on next page)

Now, the car goes to the right. If, as Barry Stone says, the car got caught in the slush, got pulled to the right side of the road, hit the snow bank and skidded, is there negligence there? Is she at fault? What do you think of this proposition? Do you blame her? Could you have done better?

Here you are driving along the road, an emergency situation comes up and you see heavy slush, a puddle, a bus coming the other way and your wheels get caught in the slush. I ask you, have you done something wrong?

You skid across the road. Have you done something wrong? That's why Mr. Spatt doesn't like skidding because you are out of control and if you are out of control it is not that you have done something wrong.

I don't think Mrs. Weiner was at fault for the accident. There is no evidence that she did anything wrong. I told you many times we can't guess about what she did. There is no evidence whatsoever of bad driving on her part.

We know they got from New Jersey to where they were without accident. We know that her driving from Mr. Stone who followed her. There is not one scintilla

of evidence as to bad driving on her part.

If the accident is due to the road conditions which she had no control over and the car skidded to the right -- Mr. Spatt makes the point that if your car turns to the left a physical force is pulling to the right. There is no question about it. It is not her fault. If the road curves to the left she has to go to the left. It is not her fault. She's not speeding.

Here's a picture of one tire on the car sometime after the accident and I don't know if you like the tire or don't like the tire and let me take this picture away and tell you that this tire has nothing to do with this accident. If Mr. Spatt says something to do with the accident and the case then let him tell you about it in his summation when he gets a chance.

MR. SPATT: Objection.

I think it is violating something we discussed in confidence --

THE COURT: There is no point made of the tire by Mr. Spatt.

MR. ZAWACKI: Well, the pictures are in and I didn't want the jurors to think it was --

THE COURT: No. Mr. Spatt didn't make that

suggestion and I thought we cleared it up earlier.

MR. ZAWACKI: Well, the jurors were not party to our discussions. I think it is cleared up now.

Now, I'm not trying to pull the wool over your eyes or tell you something that is not the fact. I wouldn't dare do it to 12 jurors but I wish you could ask me if the accident happened because of the slush and the road condition she was confronted with through no fault of her own but rather because of the road as it is described and that was the cause of the accident and is she liable. Must somebody now pay damages? Well, you cannot ask me that question. If there's any doubt in your mind after hearing his Honor, Judge Dooling's charge and I don't think there will be -- I don't think there'll be any doubt that if this accident were caused by conditions of the road and not Mrs. Weiner's bad driving there is no recovery here.

However, if there's a doubt about that you can ask Judge Dooling about that, most certainly and if there's any doubt I encourage you to do it and if you think I have misstated the facts or quoted somebody's testimony wrong, you have the right to have it read back although probably, if one of you miss something the other 11 will pick it up.

I'm not going to bother you with any more of this talk about the case. I think I have talked about what I consider to be important in the case. I am sure there are some points I wanted to mention and didn't but as I say, I don't want to go over the details but get right down to the accident; why it happened and what caused it.

The Weiners have every right to bring this case into court. We are very sophisticated now. We have come a long way and our legal system is very sophisticated. Nothing compels them to sue this way. They don't have to but they do have the right to do it.

If a client comes to a lawyer and says, "I have a case. Will you take it," nothing compels the lawyer to take the case but now they choose to do it. They choose to relive this experience of 1971 and have Allen in the courtroom when it was tried and believe me, he wasn't needed for anything and they chose to have Allen take the stand in this case, in a case where they don't get Julie back -- they don't get anything -- they get money if they get anything. This is not Allen's case. If a money award is made it goes to the parents. They have chosen to do it and I leave you with this one thought and I'm going to sit down. I am silenced

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forever and the case will be in your hands.

The one thought is this: If you put yourself in the place of the Weiners here driving a car on this road with your child in it; and accidents happen as happened here and I hate to even think about it but there's a fatality -- I hate to think about it -- I've got children and I assume many of you have -- horrible thing -- but assumes it happens. Would you come into court four years later asking some jury to tell you that you were the cause of the child's death so you can get some money for it? D

Thank you very much.

* * *

(Whereupon, Juror No. 8 was excused, and exited the courtroom.)

(Jury entered the courtroom at 11:30 A.M.)

THE COURT: Mr. Johnson, would you please take the seat of Juror No. 8.

(Alternate Juror, Mr. Johnson, complies)

THE COURT: All right, Mr. Zawacki.

(Whereupon, Mr. Zawacki delivered his closing argument to the jury, which was previously ordered and typed as an excerpt of the trial minutes.)

(Upon the conclusion of the final argument to the jury by Mr. Zawacki, the following occurred in open court.)

THE COURT: Mr. Spatt?

MR. SPATT: May it please the Court, Judge Dooling, before I start, can I accumulate some of these Exhibits?

THE COURT: Certainly.

(Pause)

MR. SPATT: May it please the Court, Judge Dooling, Mr. Zawacki, Mr. Foreman, and Ladies and Gentlemen of a Jury in a very difficult case:

I have heard a summation by Mr. Zawacki which I consider one of the best that I have ever heard in twenty-five years of practicing law.

I would consider Mr. Zawacki a skilled attorney to the point where he is almost a magician, because from a situation, a physical situation of a car goin[illegible]off the road, hitting a guardrail four and a half feet off the road, bouncing off and going a hundred and four feet without doing anything until the last possible moment, he has done a marvelous, marvelous job.

Negligence is not reckless or foolish conduct as he stated to you. It is th[illegible] lack of ordinary care. It is "What does the reasonably prudent driver do, not the reckless and not the foolish and not the criminal." This isn't a criminal case. Nobody is guilty here in this case.

Just a few observations. I, too, would like to thank you for your attention during the trial, not only because it is the right thing to do when you sit and listen to lawyers, and have no opportunity to reply, but because indeed and in fact, you have been truly attentive.

Without taking anything away from you, because of the unusual nature of this case, I would like to divide this case, if I may, into the tough or difficult part, and the easy part. And if I might,

Summation by Mr. Spatt

I'd like to talk about the tough or difficult part first, because I have been taught by my father that's what you should do.

Now, Mr. Zawacki questioned Mrs. Weiner on the stand. "You are the beneficiary. If there is a verdict here, you will receive part of the monies." That's something which came out which you must have been concerned about. This is a very difficult case for you. This is a very difficult case for me as a lawyer with ethics and conscience, I hope. It is a very difficult case for Judge Dooling, who has to wrestle with the law part of this case, and who has done an admirable job. Although I have not agreed with him in a lot of things, he is a tremendously competent Judge of great integrity. This is a difficult job for Mr. Zawacki, who on the one hand says, "My client is not negligent," and on the other hand, casts stones upon her. "She is not negligent, but what a person she is for allowing this suit to be brought." So, he is in a dual capacity. Very difficult for Mr. Zawacki.

Let's face facts. A very serious accident occurred, an accident which killed one member of the family, and injured all other members, and hurt the

busdriver and passengers, and so forth.

But, the real difficulty is not the accident itself, because of the family relationship, because Ladies and Gentlemen, if this case involved strangers, if the little child of ten was a friend of the family, it would have to be somebody they knew, because you don't carry passengers in the car who are complete strangers. And today, picking up passengers is not too prevalent. So, the passenger will be a friend, neighbor or relative.

If it were a friend or neighbor, I respectfully suggest that you would have little difficulty in awarding very substantial damages for the death of this special girl if she were a stranger. But here, you have a member of the family involved, and it is understandably troublesome to you, and, as I said, to everybody else. I must face the problem head on, for to do otherwise I would fail as an attorney and in my capacity which requires me to remember the estate of one person -- and doesn't involve Barbara Weiner -- one person not involved in this, and that is Louis Weiner, who was not driving the car, but was a passenger, and whose loss is every bit as great as hers.

I was up a good part of the night. I was up saying, "What do I say to these people? What is the answer?" Then, lo and behold, at 1:20 in the morning it came to me and it was there all the time. It is the simplest solution with honor and ethics, and the answer is, follow the law. That's the answer to this whole question.

We are a nation of laws. We have built our country on the law. The law governs our lives, liberties and is precious to us. Not only are we a nation of law, but we are a nation, supposedly, of equal law for all citizens. That is sometimes not true, but we are supposed to be a nation of equal law for all people.

The same law, the law says, that applies to the stranger in the car applies to the estate of Julie Weiner.

As the Judge told you in the selection process, there is no difference as to the duties between the child passenger and the driver. There is the same duty of ordinary, reasonable care -- not to refrain from reckless or foolish things as Mr. Zawacki told you, but ordinary, reasonable care.

There is no difference in the responsibility

of whoever is driving this car to the passenger, no matter what the relationship of the parties is, and the fact that one of them, the person who drove the car, is a member of the family, and a distributee of the estate, is irrelevant, and immaterial -- the law says -- except for one thing -- it's relevant and material, and was brought into this case because her credibility as a witness is subject to her interest.

In other words, the only reason this was brought into this case was on a technical basis -- it wasn't the reason Mr. Zawacki brought it into the case -- but the legal basis was, if someone is interested in the events, which Mrs. Weiner technically is, would she, given the opportunity, tell the truth or help her own case, because she is interested on both sides.

So, on that technicality it came into the case -- a great weapon -- but that's the reason.

I ask you, please, to follow the law, whether you agree with it or not, whether you like it or not, whether it is repugnant to you or not, because the law says that the driver has the same duty and responsibility to her own child as she does to a stranger.

If there is negligence under what his Honor will charge you, then the estate, regardless of who it is under the law, might recover the damages to the family by the loss of a child, the same damages as if they were strangers.

If Judge Dooling doesn't give you the correct version of the law, and everything he says is written down, either party who is aggrieved by it may appeal Judge Dooling's version of the law.

Of course, if I think that he was wrong in dismissing the case against Greyhound Bus, which I do -- and Mr. Zawacki disagrees with me -- then we have rights under the law. His rulings to you are subject to review by another Court, but your ruling to me or to other parties in the jury room is subject to nobody's surveillance, and what you say there is inviolate, and no one has a right to find out how you decided this case. So, if you decide this case on the basis -- and Mr. Zawacki would like -- of his last issue -- "Think of it, they came into court to recover damages for the death of their own child. She was the driver." If, in your jury room, you don't follow the law, I will never know about it, his Honor will never know about it, Mr. Zawacki will never know

about it. But, I know that you and every one of you have, I know, respect for the law, or you wouldn't be sitting here. That's not a compliment. I don't know you in real life. A lot of people get out of it. Can you take care of this for me?

Mr. Fillopane was on the jury, and he said that he was a sole auto parts salesman. That's why Mr. Johnson is on the jury. There is a man who took it upon himself to follow the law, a privilege I'll never have. The only thing I can ever get close to some day is the bench, and that's a Judge, too, because he decides questions of fact when there is no jury. But, here we have a jury which I am sure he is glad of.

Let me get to the easy part of the case, now that I have discussed the difficult part of the case, and that is the merits pro itself.

I have tried to conduct myself fairly in this case, as I try to do in every case, and I have brought before you all the available witnesses and all the available evidence that is in the case.

I have brought in a neurologist, very eminent, Dr. Lawrence Kaplan, Mt. Sinai Hospital, to interpret the Hospital record, because I read something in the

He looked at the Weiner car all the way. He

record that said at the time she was responding from, however, she was irrational and confused. I told you that in the Opening. Mr. Zawacki said I said she was living and kicking for five days, and I didn't have time to tell you that, but I resented it.

"Definite, though slight improvement -- deep reflexes -- returned to pain."

I thought she had feelings, but that's out of the case because after listening to Dr. Kaplan, he said it might have lessened her consciousness. She might have been aware of something, and I say in fairness that it is out of the case.

So, all that is left is the death action, and I have tried with all my might and experience that I have to hold the Greyhound Bus in this case. I assure you of that. I would have been delighted to have them here in this case.

Talk about the conduct of this busdriver. That's my duty, too, and I tried to do it. But, his Honor ruled there was no evidence of negligence on the part of the busdriver. He was on his own side of the road, coming down, did what he could to avoid the accident, didn't skid, tried to keep to the right. I disagree with it, but that's how it is. Against the Stones, I agree. They weren't involved.

If you look at the impact -- and I didn't hear Mr. Zawacki say anything about the extent of the impact --didn't hear that at all -- do you see what happend to this bus? Take a look at that. Do you see what happened to this car? Can you imagine the speed at which this car hit this bus to tear it off like that -- a bus that was practically stopped. All the force came from the car. Yet, the pictures are very interesting and very important and despite everything I have done in the case, we are now proceeding against only Barbara Weiner. She is the only remaining defendant in the case.

Now, I respectfully submit -- and I don't have to go through it a million times -- but I have to spend some time though it is approaching the lunch hour and I ask you to bear with me because it is the only time I am going to argue, the only time this case will be brought before this court and jury and no other -- this is it -- there is no question that the largest part of this case is undisputed.

It is conceded she was driving down the road, no snow. It has snowed lightly or not so lightly before or after, but not at the time. It is conceded it was broad daylight and every witness that I asked, which is

everyone, said the road was wet with spots of slush. Her car is proceeding along and moved to the right. The guy in back of her said she moved to the right and went on the shoulder of the road and then her car got caught.

Now, this is the key to the case, the cross-examination of Mr. Stone. Everything is nice when Mr. Zawacki repeated eighteen times that her car got caught in the slush. That's what they call in education, repetition. If you tell the kid long enough he'll finally hear you. But where on the shoulder? On cross-examination Mr. Stone said the car moved to the right; that the car went up on the shoulder of the road and then got caught in the slush. If you want to hear the cross-examination again, you may.

I join with Mr. Zawacki. You're not supposed to drive a car on the shoulder. At any rate, she got caught in the slush, hit the guardrail, bounced off -- everybody says that -- she lost control of the car -- everybody says that -- maybe there was no place for her to go. But she lost control. However, the cop said, "That's what the bus driver told me, Mr. Stone."

Mr. Stone said, "I put it down in the narrative, 'Lost control.' And the sergeant, who I don't know from a hole in the ground said, 'If there was a box

for 'Lost Control' that's what I would have put down."

Is that what I'm trying to push off on you? No. She lost control in that she did not exercise reasonable care, in that she didn't follow the contour of the road and went on the shoulder where she should not be. Do I say that? No. Mr. Stone says that, the bus driver says that.

So, the lack of ordinary care followed the negligent act, and that's going up on the shoulder of the road.

I will well concede there are situations -- and some of you are drivers I'm sure -- where a person may skid without his or her fault. For example, traveling on an icy road in the dark and hitting an icy patch of the road and the car skids out of control. Does anybody do anything wrong? No. But this was in broad daylight, and seeing what there was, she somehow moved to the right onto the shoulder and that was trouble, and she failed to exercise reasonable care. You are not supposed to go off the road and the inference to be drawn is that you are not careful in some way. And I will get to that and I am not emphasizing -- and Mr. Zawacki is quite correct, quite astute, excellent lawyer -- I am not emphasizing the yellow lines because I am not too much

concerned. After all, what could she do about those yellow lines? She was out of control or sleeping or something.

Well, why did she -- let's face that question -- why did she go off? Let's face that question and find an answer on the proof in this case, not wild guesses. Let's see what we have.

Mrs. Weiner doesn't know anything. Mr. Weiner doesn't know anything, Alan Weiner doesn't know anything because they had serious head and brain injuries and were unconscious.

If you don't follow the road there are possibilities that, one, you weren't paying attention and went into the snow; two, his Honor and I bandied the word around and it is centrifugal force -- and if nothing else, that is quite an accomplishment -- you turn to the left and which way does the car go? The car goes to the right. I asked two drivers and they said, "Yes, if you don't control the car it goes to the right." That's what happened, but it hit a guardrail. She might have not followed the road carefully, considering the centrifugal force, allowed the car to pull to the right or she might have fallen asleep.

The question was asked of her:

"Q Did you fall asleep when this accident happened?

"A I don't know."

What other evidence corroborates any of these possibilities? Well, if she was asleep or she dozed for the moment and the car hit the guardrail with severe force, force enough to bounce it off, it would have awakened her and she would have seen the car hurtling across the road and by the time she got her senses the car crossed her line, the double yellow line and almost on the shoulder, as the bus driver said, because as he said, just before the Weiner car was going off the road it suddenly turned. It turned at possibly a bad moment because at that time it hit the bus head on and suddenly did a U-turn. So, she could control that car. Why didn't she for a hundred feet? Maybe she came to at that point. She did control the car. She turned the car and didn't skid, turned it around, hurtling down the road at the last minute. Why not before? Did anybody see the brakings on that car? Nobody touched the brakes. A car with studded snow tires, metal points coming out of the tire giving it the most protection of any vehicle protection. If she had turned the car sooner, I don't

think there would have been this tragic accident.

Now, evidence is physical facts, and everything I have said to this Court and jury are indisputable physical facts. Could I not sue as a lawyer having the right to sue -- could I not sue if I was representing-- God forbid -- any one of you? Could I face these physical facts of a woman driving who loses control, goes on a shoulder, bounces off the guardrail, travels 104 feet -- could I not sue Barbara Weiner? Could I take back what's been done? Would not everybody be happy if we could take back what has been done?

Mr. Zawacki defended the case by, one, she got caught in the slush, and, two, she skidded and as far as examining those two, there's Mr. Stone who said she moved on the shoulder. I am following the same thing of repetition now. He said it was a clear road with spots of slush.

Mr. Ronald Brown, the bus driver, said the road looked like it had been plowed. You look at those pictures. Where does he get that from? I don't know, but that's what he says. Unless it wasn't so bad as the picture showed it to be. Why say that? Wouldn't that be against his own interest? "The road was so bad I couldn't stop in time." He was still a defendant

in the case. "The snow was all over the place. I couldn't stop. I didn't have a chance." Did he say that? No. He said it looked like it had been plowed and this doesn't look as though it was plowed.

The photographer came in and I'm sure with four unconscious people and a bus driver pinned in a bus, I am sure they cannot call the photographer first thing. Mr. Stone said it snowed afterward. How much, I don't know.

Mr. Stone didn't get caught in the slush even though faced with an emergency situation. He skidaddled down that road with the same puddles, same slush and he is hitting the brake and did he skid? He did not. He kept to the middle of the lane and never lost control of his car because he exercised reasonable care even under an emergency. But Mrs. Weiner moved to the right onto the shoulder and hit the guardrail. Those are the physical facts and I can't ignore them.

Do you get caught in the slush with a big fat studded snow tire or does it grind the slush into nothing? But you get on the shoulder and hit the guard-rail and you're going to have troubles.

Mr. Stone had no problems. He didn't get off the road. She did, unfortunately. She was caught in

slush and if she was, she got caught in slush on the shoulder and hit the guardrail, and that was the impetus and the machine that blew this bomb and caused all this to happen, because she didn't use reasonable care.

She wasn't supposed to be driving. Mr. Weiner was going to do this heavy driving on these country roads or highways like the throughway for hours and hours on end. But Mr. Weiner, unfortunately -- and this is all fate -- fate plays a part where you are there at the right time sometimes and it is not a question of what you are doing -- but he was sick and she had to take over the wheel and she, I daresay, was not as experienced, if it follows the same routine as with my wife, she was not as experienced with driving on these roads as a man.

So, I was telling you as a driver, as a driver, I am driving along the Belt Parkway sometimes and thinking of something and I find I am too far to the right and I say, "Oh, golly, watch out." Well, that was lack of ordinary care on my part. I have to concentrate on that wheel or shoulder and it has happened to me. Sometimes, perhaps you get a little drowsy. I am sure it has happened to you. Maybe, ladies and gentlemen,

if she were going slower, maybe this centrifugal force would not have pulled her to the right; if she was going slower, considering it was a wet road unfamiliar to her.

Now, once she hit that guardrail did she handle the situation properly? She got on the shoulder, hit the guardrail. Did she handle the situation? She did nothing, didn't brake until the last minue. So, even in an emergency situation, you have to exercise reasonable care.

She didn't hit the brake light. They didn't see the brake lights and she turned at the last minute in front of the bus to hit it head on.

I don't care what Mr. Stone said. You can imagine the speed if that slight movement of a few feet after the hundred feet straight across the road she turned into that bus for a few feet and did this damage. It wasn't even a straight angle. Accordingto Mr. Brown, she turned into him at an angle. The worst possible thing. She didn't intend it or mean it, God knows, but that's what happened. Proof of lack of ordinary and reasonable care.

I mentioned his second point was skidding, which I kept away from like the plague.

keep it from themselves and give it to their children,



I say to you, ladies and gentlemen, there is no proof in this case of any skidding, but if you find that there was and the only proof in the case of skidding, meaning sliding sideways or something like that, not going straight across, if you find that there was skidding, then I respectfully submit that taking into consideration all of the circumstances of this case, including the going on the shoulder and striking the guardrail, there was still, even with the skidding, a failure on the overall basis to exercise reasonable care because the skidding resulted from a failure to exercise reasonable care in keeping the car on the road.

So we see the skidding. The sergeant said he meant "out of control" in his narrative. He put "out of control." His diagram went straight across. You can look at it. I can't understand too much about it but passsssst -- straight across.

Now, this bus was pushed back four to ten feet on the police officer's form, six to eight feet on Mr. Brown's version. 28,000 pounds, an additional 10,000 pounds allowing for the people with their luggage, against a five or six thousand pound car. I don't know the weight of a Chrysler Imperial.

Now, this car drove the bus back eight to ten feet and it's five or six times greater in weight. Can you imagine the force that drove the bus -- almost stopped but still slightly moving forward -- back eight to ten feet? Is that evidence of speed and failure to exercise reasonable care and maintain a safe speed on the highway, a wet highway? Is that failure to exercise reasonable care?

Let's go into all those things because Mr. Zawacki said there is no evidence of any negligence in this case and he might have had you going with it.

He questioned both drivers and they told him the car bounced off the guardrail, nothing about speeding. He was the only one that said the road was divided by a double yellow line but no one could see it. There is a picture taken weeks later. I don't know if you saw it yet but there it is. What difference does it make whether there was a double yellow line or not? Was she in a position to stop the car? She was out of control. She wasn't touching the brake or wheel. What was she doing? I'm not too concerned about this because she wouldn't have done anything, probably, if she had seen it, but whether she was in a position to do anything about it is very

doubtful.

Now, Barb[illegible] Weiner. Classic cross-examination by Mr. Zawacki.

"You know, you are a beneficiary."

"No, I didn't know."

"Do you remember anything about this accident?"

"No."

I could have asked Dr. Kaplan. There is such a thing as retrograde amnesia following an accident or injury to the head or brain. I'm sure if I had asked him if it was applicable here he would have said yes. That's not my province but her lawyer's province and he chose not to do that because, as sure as I am standing here, this woman has no memory of this accident either because of a physical injury to the brain or because this memory is so horrible to her that she has blotted it out of her mind to protect her own sanity.

I could ask her questions. She sent in affidavits to the Motor Vehicle, "I know nothing." She signed a statement for Mr. Zawack, "I don't remember anything. I don't know anything."

Mr. Zawacki infers she would help him if she had remember what happened. I don't know about that.

I don't know. That's an interesting question. Would she have helped if she remembered what happened? My opinion is that when she hit that guardrail either she was asleep or she panicked, froze, never touched the brake. She only got herself to move in this horrible situation in the very last minute to avoid going off the road when she pulled that car to the right. She just froze and panicked. Is that a fair inference from the evidence in the case: that she pulled it out just before the shoulder and just into the path of the bus?

Her husband, the father, he remembers two things: a guardrail and a bus.

Mr. Weiner cannot be held to blame for this accident. His only involvement was that he was the owner of the car involved and he is now no longer in the case. He sent an affidavit to the Motor Vehicle Bureau and gave a statement that he didn't remember but for two things, the guardrail and the bus.

Then we have Ronald Brown. What was the condition of the road -- because it was terrible Mr. Zawacki says to you. It might have been. Exercise reasonable care on a terrible road. Darn right. Crawl down that road 40 miles an hour. I don't think the road was that bad because Mr. Brown said, "The road looked like it had just been

plowed."

He looked at the Weiner car all the way. He never took his eyes off. He know what was going to happen. He said the car didn't skid and in his narrative he said -- andthis is another interesting point -- he said he applied his brake not even all the way, finally, not even down to the ground and he was able to stop in 60 or 70 or 80 feet.

If Mrs. Weiner applied the brakes would she have been able to stop?

He stopped with a full load coming down a hill, he says, in 70 to 80 feet. Why couldn't she? Same road. So, it was a little more snow on one side than the other. She was already across it now in the middle of the road. Why didn't she apply the brake?

He said the car -- although he didn't know the speed -- he said it was coming fast. We can see that from the picture. This 104 feet of skid marks, what the officer testified he did was, he went to the scene of the accident, ascertained where the car hit the guardrail and where the debris was from the impact and measured the two things, and that's where he got 104 feet. Does that mean that car skidded a hundred four feet; that the car did anything but travel 104 feet?

But they used the word "skidmarks." What skidmarks? On a wet road? Tire marks, yes.

Then we take Janet Brown. She didn't appear and testify before you. Very nice lady. In the back with her husband. Came in after my case was over. But I read her EBT and she made a few interesting points. She said the road was wet, shiny wet; blacktop, wet, shiny, not a lot of snow.

"Was there moisture kicked up by the car in front of you? You know, when there's snow on the road you kick up a lot of moisture.

"No.

"Was the windshield clear when the accident happened? Was there dirt, slush or anything else?

"No, the windshied was clear.

"Was there heavy slush at the time of the accident?

"I doubt it.

The last witness was Barry Stone, who of course is a key witness in this case. He wasn't hurt or unconscious. He had a panorama of this thing. He couldn't be in a better position to see. I won't go over again what he said -- "She moved to the right on the shoulder and then hit the snow."

He said -- the only one who said it -- it snowed lightly before the accident and afterwards it started to snow. No matter how many times Mr. Zawacki asked about the photos he said "I dont think it looked that way at the time of the accident."

He didn't skid. The Weiner car didn't skid. He was questioned on that for fifteen minutes and he said, "To the best of my ability I didn't see that car skid."

Why should he say anything like that if it wasn't true? He was a disinterested witness at the time. He was out of the case. He is a truthful man. "I didn't see the car skid."

Alan Weiner, who was playing ghost with his sister at the time, the next time he remembers is waking up in the Albany Medical Center, a week after the accident, and I didn't bring Alan Weiner into this case and put him on the stand and ask him those things, what would Mr. Zawacki have said? He would say, "Where is the missing witness?" And it wasn't nonsense what he said a bout playing ghost with his sister. It wasn't nonsense.

I say in conclusion, if there was negligence on the part of the driver of this car, somebody should pay

for the loss of this child. If there was negligence on the part of the driver of the car, somebody should pay for the loss of this child.

I think that we have proved by a fair preponderance of the credible evidence that there was lack of ordinary care and that that lack of ordinary care was a substantial factor that caused her to go off the road, not to complete the curve in the road, not to follow the road, hit the guardrail and then go zooming across and doing very little to correct the flight of the car.

Of course, there is no claim that Julie Weiner in any way contributed to this accident or was in any way involved. She is completely innocent.

You need only be concerned with Mrs. Weiner's operation of the car. If she was negligent in any way which was a factor or substantial factor in causing this accident, then the estate must recover.

I don't want to go into speeding, keeping a proper lookout. I say, if there was an emergency, she didn't handle it right and caused this accident by going off the road in the first case, and as far as the statute, which is not a rule of the road but the vehicle and traffic law of the State of New York, which

is having regard for speed -- and hisHonor will give it to you -- and the double yellow lines, they didn't cause this accident. What caused this accident is that she didn't keep on the road and went off on the shoulder and hit the guardrail and I say that that going off the road -- this is an important point -- that alone, going off the road and hitting that guard-rail might, by itself, might be but not necessarily is, evidence of negligence -- that alone, without anything else, forgetting speed, not braking and turning into the bus and everything else.

Well, I have gone on a long time. I just wanted to cover completely the question of -- we always have too much because we think we are going to forget something in our zeal to try to do the best possible job for our client -- however, I think I have and I respectfully submit that I have established many instances of lack of ordinary care which resulted in this tragedy, and I want to talk to you about the last subject and that is the damages in this case, which is a rather difficult subject also because it is, after all, against the law of nature for parents to bury a child but rather a child should bury a parent.

A family has been devasted by this loss. The

law can provide very little solace. Under our form of jurisprudence in a civilized country there is only one way -- I didn't invent it -- to compensate a family for a loss and that is paying monetary compensation. Very poor and unsatisfactory. I agree with Mr. Zawacki, it is very poor and unsatisfactory.

When I say these words my heart is heavy because nothing in the world -- and I don't care what the rules are -- means anything and if this child could be restored -- well, they would give up everything in the world.

Again, what is the answer to this problem? Again, we go back to the basic rule for the answer to all problems in a civilized society: Follow the law.

The law is correct on the measure of damages, as Mr. Zawacki gave it to you. He told you correctly the law, except for a few little things which I will bring to your attention.

The estate in this case, the parents are entitled to be justly and fairly compensated for the pecuniary injuries. Now, what does that mean? It may be a large pecuniary loss or very little.

It depends upon the child and the potential of the child and to judge the potential of the child, I've brought in evidence which is relevant and material to this and that evidence is based on the following factors: character, habits, ability of the child; also, the type of parents -- are they going to be in need -- obviously not; the services which the child would have performed for the parents; pecuniary loss, going to the store, helping clean up. Can you relate to the pecuniary loss? That's what the law provides. The training and help she would have given her brother must be translated into pecuniary loss: tutor perhaps. That is part ofthe case; not a big part, but part of the case because in this case there is real proof that she helped him skip a year to where he was in the same class, a very unusual thing and, of course, proof of her potential in the future, less maintenance by the parents.

Well, how do you prove these things? What is the best maasure of proof?

I think Audrey Weiner is a good measure of proof, even though she is the grandmother. She is a forthright lady who went to hell in this thing, stated two weeks up there running from hospital to hospital,

sixty miles, then went back to Brooklyn to bury her granddaughter, and she is entitled to get on the stand and talk about her granddaughter. I think so. You judge this woman by the same God-given experience and common sense you use to judge anything else you do in your life.

The assistant principal of the Board of Education, with the Board of Education for 25 years, she knows a little bit about potential, and you heard what she said about the child -- beautiful, bright, good, top, top, top.

But Audrey Weiner is an interested witness, the administratrix of the estate, and more than that, a grandmother. And what grandmother could see anything but good in their grandchild.

So, I went out and got one of the teachers and it wasn't a difficult job.

There was Ruth Soperstein, and I got certified copies of the school records which you can look at with the other exhibits if you would like. There is nothing more revealing than your school record. Everything is here from a teacher who doesn't know that in the years ahead these will be part of any record of any trial and these records are objective

negligent. In reaching your final conclusion on



and I respectfully submit they are the most relevant and material proof of scholarship, character, ability and potential that we could ever get in any court-room. These records are the most relevant and they say -- and there is a picture attached which came with the records --that she was in good health, had special achievements other than curricular subjects meaning spelling, reading and arithmetic; received nothing but A's for four years, and in science, one B-plus and three A's.

Now, of course, marks don't make the person -- and I have daughters. Marks don't make the person. I wish they would but they don't. There are people, I call them "egg heads"; they get good marks but that doesn't mean you are going to be successful in life. Because to be successful in life you have to be a well-rounded individual and have it on the ball.

So, we look further into the school record -- forget Mrs. Weiner -- reading tests, high average, very high. Basic skills, all-around activity and achievement: two years ahead of her chronological age. Intelligence tests, 135, and that doesn't mean she is an all-around well-rounded kid, but when you come to the teacher's notes, it's truly a wonderful

thing. This is the last note made by her last teacher in the fourth grade. "Julie attacks her work with zeal. Excellent in all areas and shows outstanding ability in math. Always eager to participate in classroom activity." The one above, "She is a pleasure to have in the classroom. Work habits -- excellent."

This is her record for five years including kindergarten. Effort, excellent for five years. Her citizenship, excellent for five years. If there is anything left to say about that -- and it is my duty to draw a picture of her for you -- it is Mrs. Soperstein's final remark when I asked, "What do you think of her scholastic ability?" The answer: "Top one per cent of the class."

Then I asked about her ability as far as her future was concerned. The response was, "Highest caliber, college material."

I asked, "What do you think about her being capable, her endeavors?" The answer: "Capable of being successful in anything she might choose." She came from New Jersey to tell you that.

Mr. Zawacki told you that having a child is a liability today and he is right because people will

keep it from themselves and give it to their children, especially today. We didn't have it ourselves so we want to make sure our kids have it. And in the field of education, especially so. But that's not always the way it will be because the pendulum of spending for a child swings both ways and the time might well come when the child might have to support the parents.

I saw some play which always impressed me -- I don't know the name -- when someone turned to her children and said, "These are my jewels."

So, what do you do? What is pecuniary loss? Well, first of all, the funeral bill and the hospital bills come to $2700 and that of course is the least important. The most important -- and I'm not going to give you an idea because I don't know -- I just don't know, I dont know -- the services she would have performed for her parents: cleaning, shopping, babysitting, the guidance and assistance she would have given her only brother; the earnings she could have earned within the guide lines referred to, and I know this: that in the case of a strange child passenger, a strange child, a substantial amount in the sum of $100,000 was awarded and would not be

accepted here --

MR. ZAWACKI: Your Honor --

THE COURT: This is not a consideration to be presented to the jury. You must form your own judgment in this case of what you think is a reasonably fair and just compensation in money for the pecuniary losses of the parents for the child.

MR. SPATT: I said there is equal law in this country. There is supposed to be equal law for the father, Louis Weiner. The law says there should be no recovery for grief or sorrowand I follow the law and I ask you to do the same, although I don't like or agree with it.

I have taken two important oaths in my life. The first was in 1943 when I entered the Navy and the second in 1950 when I became a lawyer and was sworn to obey the Constitution. They have been solemn to me and I have never consciously broken my oath both to my country and to the Constitution.

I ask you and I know that you will observe the awesome duty of your oath to follow the law.

Some cynics say today in view of what is going on in this country that we have accepted a breakdown of laws, that we have accepted violation of the law

as everyday occurrences and violations of our oaths as common as an ingredient as your morning coffee and have grown immune and accustomed to violations of oaths and laws. I say no. I have faith in an American jury drawn from all walks of life to observe their oaths and follow the law.

Thank you very much.

THE COURT: We will have a recess now, members of the jury, and I believe that they have brought your lunch and then we will have the instructions on the law when you have finished your lunch.

Please do not embark upon your discussions of the case until after you have the instructions on the law.

(Jury excused at 1:30 p.m.)

(The following occurred in the absence of the jury.)

THE COURT: Before we part there are two questions. Where do we stand on a skid charge?

MR. ZAWACKI: Your language or the pattern jury instructions?

THE COURT: That's the choice.

MR. ZAWACKI: I have studied it. I would request the pattern jury instructions.

THE COURT: I think it fits in with your closing argument.

All right. I will drop the second paragraph on page 11.3(a) and charge the language of PJI 2:84.

Then the other question is, what about the 11.26 charge? Do you want it in or out?

MR. SPATT: I counted on it being in.

THE COURT: I couldn't tell whether you counted on it being in, out, or both.

MR. ZAWACKI: I would ask to insert the words "visible or that could be seen" in the proper spot. The way it is worded now it is in such fashion that if the lines were there --

THE COURT: For the reasons that I explained before, I feel unsafe in doing that.

MR. SPATT: I think the jury understands it now, your Honor. We both said the same thing to them. It is not prejudicial to him at this point.

MR. ZAWACKI: I think it is. I think the charge as it reads now, "If you find that there was such double yellow line"--

THE COURT: I know but as I say, we go right on the next page to give them every out in the world.

MR. ZAWACKI: The last thing I would ask your

Honor is to specifically disregard Mr. Spatt's reference to $1[illegible]000 --

THE COURT: I have already done that and I think if I mention it again it will just call their attention to it.

MR. SPATT: For my education, what is the objection?

THE COURT: You are not allowed to state what was done in another case by another jury.

MR. SPATT: But if I had asked on my own --

THE COURT: Well, I think an attorney is entitled to ask.

(Luncheon recess taken.)

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(Afternoon session.)

(Jury entered jury box.)

THE COURT: Members of the jury:

You have heard the evidence in the case and the arguments of counsel and now must receive the instructions on the law that governs the case.

You, the jurors, are the sole judges of the facts. You must, however, follow the law as given to you in these instructions and apply it to the facts as you find them from the evidence before you. You are not free, nor am I, to substitute our private judgments as to what the law should be for what the law in fact is.

You have been sworn as jurors well and truly to try this case and to render a true verdict. You must therefore exclude from your deliberations all bias and prejudice. You must not permit yourselves to be governed by sympathy or any other considerations not founded in the evidence and these instructions on the law.

In this, a civil action, the party having the burden of proof on a particular fact must prove the fact in issue by a preponderance of the evidence. A fact is proved by a preponderance of the evidence when the evidence to support that fact is such that, when

considered and compared with all the other evidence relating to it, it produces in your minds the belief that what is sought to be proved is more likely the fact than not the fact. In determining whether any fact in issue has been proved by a preponderance of the evidence relating to it, you consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them. The burden of proving a fact may be sustained without the party having the burden of proving that fact calling any witness to it, if the evidence otherwise in the case persuades you that the claimed fact is more likely so than not so.

Plaintiff's claim is based on allegations of negligence. Negligence is lack of ordinary care. It is the failure to exercise the care that a reasonably prudent person would exercise in the same circumstances. It is doing what a reasonably prudent person would not do, or failing to do what a reasonably prudent person would do, in the same circumstances. A person who is negligent is responsible to those whom it is reasonably forseeable that his negligent conduct will harm, and he is

responsible for the harmful consequences proximately caused by his negligent conduct. His negligence need not be the sole factor in bringing about the harmful consequences, but it must be a substantial factor, that is it must have had such an effect in producing the accident and injury that reasonable people would regard it as a cause of the accident and injury.

In order to recover, then, Plaintiff must bear the burden of proving by a preponderance of the evidence first, that Defendant was negligent, second, that the defendant's negligence created a reasonably foreseeable risk of bodily harm to persons in Plaintiff's situation, and third, that Defendant's negligence was a substantial factor in bringing about Plaintiff's accident and injury.

If Plaintiff fails to prove any one of these three elements by a preponderance of the evidence, then you must bring in a verdict for defendant. If Plaintiff does prove each of these three elements by a preponderance of the evidence, then you must return a verdict in favor of Plaintiff.

There is, of course, no claim here that Julie Weiner herself contributed to cause the collision. We are concerned only with Mrs. Weiner's

operation of the Weiner vehicle.

Your first task is to determine from the evidence what occurred on the evening of March 7, 1971, what were the weather, road and light conditions, how fast were the vehicles going, and finally, what was the sequence of events.

In this case neither Mr. nor Mrs. Weiner had testified about what happened, and you have heard the testimony about the reason for that. Hence, you must determine what occurred from all the circumstances including the testimony of Sgt. George Stannard, Ronald Brown and Barry and Janet Stone if and to the extent that you accept their testimony as reliable.

A driver has the duty to operate his automobile with a reasonable amount of care, having regard to any hazards existing due to weather, road, traffic and other conditions. A driver is under a duty to maintain a reasonable, safe rate of speed; to have his automobile under reasonable control; to keep a proper look-out under the circumstances and conditions then existing; to see and be aware of what is in his view; and to use reasonable care in avoiding an accident

More specifically, as the Vehicle and Traffic Law Section 1180 provides:

"(a) No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.

"(b) Except when a special hazard exists that requires lower speed for compliance with subdivision (a) of this section, or when maximum speed limits have been established as hereinafter authorized, no person shall drive a vehicle at a speed in excess of fifty-five miles per hour.

"(e) The driver of every vehicle shall, consistent with the requirements of subdivision (a) of this section, drive at an appropriate reduced speed when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when any special hazard exists with respect to pedestrians, or other traffic by reason of weather or highway conditions."

A person confronted with an emergency, that is, with a sudden and unforeseen condition not caused or contributed to by his own negligence, and who must act without opportunity for deliberation to avoid an

accident, is not negligent if he acts as a reasonably prudent person would act under the same emergency circumstances, even though it appears afterwards that he did not take the safest course, or exercise the best judgment.

Where a statute directly imposes a specific driving rule, failure to conform to that rule is negligence.

There is evidence that a double yellow line divided the two lanes of highway 149 at the point where the accident occurred. A double yellow line under the State Regulations is a "full barrier" marking signifying that vehicles proceeding in either direction along the highway may not drive on the left side of the double yellow line. Vehicle and traffic law Section 1126(a) in force at the time of accident and today, provides that "...no driver of a vehicle proceeding along such highway shall at any time drive on the left side of such markings."

If you find that there was such a double yellow line and that Mrs. Weiner drove her car to the left of the double yellow line, you must find that she was negligent in operating the Weiner car.

However, failure to drive to the right of the

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double yellow line may be justified or excused by emergency or other unusual circumstances. It is for you to say in all the circumstances and on all the evidence whether defendant drove her car across the double yellow line, or whether at the time her vehicle crossed the double yellow line it had gone out of control and could not be prevented from crossing the line.

If you conclude that there was not a violation of that statute in all the circumstances you must nevertheless review all the evidence and circumstances apart from that particular driving rule and determine from that review whether defendant was or was not negligent.

The fact that the Weiner car crossed the center line into the path of the bus, if you find that to be the fact, is evidence from which you may find that the defendant was negligent. Similarly, the fact that the Weiner car left the roadway on the right and struck a snowbank or guard rail, if you find that to be the fact, is evidence from which you may find that the defendant was negligent. However, neither fact, standing alone, nor both standing alone, requires you to find that defendant was

negligent. In reaching your final conclusion on negligence you take into account all the evidence bearing on that issue.

The fact that Defendant's motor vehicle skidded, if you find that to be the fact, is a circumstance to be taken into consideration in determining whether Defendant exercised reasonable care in its operation, but does not, standing alone, require that you find Defendant negligent. If, taking into consideration all of the facts and circumstances existing at the time of the incident, including the condition of the road, the condition of the weather and the speed at which Defendant was operating her vehicle, you find that Defendant's car skidded as a result of her failure to use reasonable care, you will find that she was negligent. If you find that the skidding of Defendant's car did not result from her failure to exercise reasonable care, you will find that she was not, in this respect, negligent.

If, and only if, you find Defendant liable, must you then consider the question of damages.

The damages include, first, fair and just compensation for the pecuniary injury resulting from

Julie Weiner's death to her parents.

The measure of damages is fixed by statute at "such a sum as the jury...deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought." The present action is brought on behalf of decedent's parents. Since the statute limits recovery to pecuniary injury, you may not consider or make any award for sorrow, mental anguish or injury to feeling or loss of companionship. You must appraise in an impartial manner to the best of your ability the pecuniary or money value of decedent to her parents on the day she died.

In fixing that value you should take into consideration Julie Weiner's character, habits and ability; the circumstances and condition of her parents; the services she would have performed for her parents and the intellectual, moral and physical training, guidance and assistance she would have given her younger brother had she lived; and what she would in the future and during her minority have earned, less the cost of her maintenance during that earningsperiod.

The damages include, second, the reasonable medical, nursing, and hospital expense incurred for which the child's parents were liable and for reasonable funeral expenses incurred and I think the only evidence on that was of $2,700.00.

I said to you earlier that the essential elements of Plaintiff's case must be proved by a preponderance of the evidence. If the evidence on any essential element of Plaintiff's case is, in your judgment, in balance so that the weight of the evidence, its persuasiveness, does not incline either way, and leaves you quite in doubt, then you resolve that issue against the Plaintiff.

Now, I will not summarize the testimony. You have heard ten witnesses, to name them in order: George Stannard, Barbara Weiner, Lawrence I. Kaplan, Louis B. Weiner, Barry Stone, who testified by deposition and here in court, Ronald M. Brown, Janet Stone, who testified by deposition, Alan Vance Weiner, Audrey Weiner and Ruth Soperstein. Thirty-three exhibits have been received in evidence.

I have said that you must decide the case on the evidence. The evidence is the testimony of these witnesses and the exhibits received in evidence.

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Statements and arguments of counsel and answers stricken from the record are not evidence.

The evidence includes, of course, what is brought out on cross-examination as well, of course, as what has been testified to on direct examination.

Your verdict must be based on the evidence. But in your consideration of the evidence you are not limited to the bare words of the witnesses and the bald facts that you find have been proved. The evidence includes the inferences reasonably to be drawn from the testimony which you hear and the facts which you find have been proved.

There are two types of evidence from which you may lawfully find that a fact has been proven. One is direct evidence, such as the testimony of an eyewitness to his observations of the facts to be proved. The other is circumstantial evidence, proof of facts and circumstances which rationally imply the existence or non-existence of other facts because such other facts usually and reasonably follow according to the common experience of mankind. Thus, the footprint of a man in the sand implied to Robinson Crusoe that there was another man with him on the desert island and, indeed, there was, the man

Friday.

As a general rule the law makes no distinction between direct and circumstantial evidence. If the evidence, as here, is in part indirect and circumstantial, then you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You are the sole judges of the credibility of the witnesses. The motives and state of mind of each witness as they appear to you and the circumstances and inducements under which the witness testified are to be taken into account. Consider any relation each witness may bear to either side of the case and the manner in which the verdict might affect him.

The testimony of each party is competent and is to be judged by you by the same standards as that of any other witness including inevitably the effect of the witness' interest in the outcome of the case.

You may consider the appearance and manner of each witness on the witness stand, the witnesses' apparent candor or lack of it, and the character of the testimony given, whether the testimony contains inconsistencies or discrepancies, whether it is intrinsically credible or seems to you in whole or

charge referring to three areas of drawing a con-



part improbable, and whether it conflicts with other testimony or is consistent with other testimony in the case.

In weighing the effect of conflict or discrepancy consider whether it pertains to a matter of importance or to unimportant details and whether it seems to you to result from innocent error or from falsehood. If you find a witness has been mistaken or untruthful, in all or in part of the testimony given, then you may give the testimony of that witness such credit, if any, as you think it deserves in the light of the nature and extent of the defects that you find in it.

Evidence that at an earlier time a witness made a statement inconsistent with or contradictory of that witness' testimony here in your presence justifies you in rejecting the testimony given before you on that point but does not require you to reject the testimony. You must decide in the light of the inconsistency and all the other factors bearing on the credibility of the testimony whether you do or do not accept it as true. You do not, however, take the earlier statement as establishing the true facts; rather, you treat it as at most nullifying the

testimony given here in court.

If, however, a witness adopts as true a statement he made out of court at an earlier time, then you may treat that out-of-court statement as the witness' evidence.

Where a party has made a statement out of court or testified in a deposition before trial, such a statement or such testimony may be offered as evidence against the party. If a party's out-of-court statement or testimony and his in-court testimony before you are contradictory or inconsistent you can reject both versions or accept one of the versions if you conclude that version is credible.

If you conclude that a witness hasknowingly testified falsely concerning any material matter, you have a right to distrust that witness' testimony in other particulars. You may reject all the witness' testimony or give it or parts of it the credence you think it deserves.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses, which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other

evidence, which does produce such belief in your minds.

The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

The evidence has included certain expert testimony. Ordinarily, opinions of witnesses are not received in evidence. However, opinions of expert witnesses are an exception to the rule. A witness who, by training and experience, has become well-versed in an art, science, profession or calling, is permitted to give you his opinion on matter in which he is versed and which is material to the case and he is permitted also to give you the reasons for and basis of his opinion.

You should weigh and evaluate the testimony of an expert witness precisely as you weigh the testimony of any non-expert witness. Take into account the probability and reasonableness of the matters to which he has testified, the schooling he has had, the learning and standard that he has in his calling, or the want of it, and whether he has

had that breadth of experience in the field which would lend weight to his opionions. You should ask yourselves: Is this witness, by the standards, qualified by training and experience to render valid and reliable opinions on the topics on which he testified? His testimony should be given the weight to which on such analysis you conclude that it is entitled. If you conclude that the witness is not sufficiently qualified or that the basis of his opinion is inadequate, you may entirely reject his testimony.

I have sought not to comment on the evidence or to give any impression as to my own view, if I have one, of the relative weight of the evidence. If I have done so, however, you may disregard it entirely for you are the sole judges of the facts.

From time to time in the course of the trial objections have been made and rulings on evidence given. Draw no inferences from the comparative frequency of objections of one or the other side or from the comparative record in having objections sustained. Where an objection to a question has been sustained, disregard the question and draw no inferences from its wording about the answer that

might have been given. Where an objection is overruled, evidence then received has no special weight because unsuccessfully objected to.

Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching agreement if you can do so without doing violence to individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. Your task is one of conscience, and pride of opinion has no place in matters of conscience. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The form of your verdict is simple. If you find for the Defendant, then in answer to the Clerk's question your Foreman answers simply, "We find for Defendant." If you find for Plaintiff, then in answer to the Clerk's question, you answer

simply, "We find for Plaintiff in the amount of dollars" so many.

You are not partisans -- you are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

When you have reached a verdict and are ready to report, simply advise the marshal that you have reached a verdict without disclosing orally or in writing what your verdict is.

Your verdict must not be disclosed to anyone before you deliver it orally in the courtroom in response to the questions of the Clerk of the Court.

If you wish to communicate with the Court, do so in writing, using the Foreman, Juror No. 1, as your intermediary and representative. Notify the marshal when you have any such communications. The marshal will be out here so you have to open the soundproof door and knock on the inner door of the courtroom and he will open it and you will give him the message.

There will now be a short recess during which counsel will review the charge with me to make certain that nothing has been omitted or misspoken. Then you will retire to the jury room to deliberate your verdict.

(Jury excused.)

* * *

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(The following occurred in the absence of the jury.)

MR. SPATT: I respectfully except from that part of your Honor's charge with regard to the burden of proof in a death action in which you said that -- you charged the normal burden as in any negligence case and I except from that portion. Do you want me to make a request now --

THE COURT: You reiterate.

MR. SPATT: PJI 1:1f1 second paragraph, first sentence.

THE COURT: Yes, I refuse to so charge for the reasons earlier stated.

MR. SPATT: I respectfully except from your Honor's charge with respect to damages in that your Honor charged that the damages can only be during the minority and I except from your Honor's charge as not being in the exact language of the Pfaffenbach case, which I asked you to charge earlier.

THE COURT: No. You said so and then you said you would go along with the language. We have got the Coury language, anyway.

MR. SPATT: Did I? I'm sorry, Judge. I withdraw that, then.

There is one other exception, your Honor, but I can't seem to find it. I guess that's all the exceptions, your Honor.

THE COURT: Mr. Zawacki?

MR. ZAWACKI: I have no exceptions and no requests except what I previously requested and excepted to and that's all a matter of record.

THE COURT: Yes. And you do reiterated those as exceptions to the Charge.

MR. ZAWACKI: Yes.

I do have one question: The expert witness charge was given and the only expert was the doctor. The doctor's testimony is moot. I meant to call it to your Honor's attention.

THE COURT: Well, I thought of not charging it and stopping right there and then I thought there were a couple of expert questions of standard and a quasi-expert question asked of Brown, and then the other thing was that Kaplan had testified and his attention had been drawn to these two things in the hospital record. He talked about them and the jury heard him and while I think it was made plain to the jury that no pain and suffering case was made out, it was all there and I thought maybe I'd better leave it as it was.

MR. ZAWACKI: I suggest nothing at this point can be done except to cause confusion.

But what about the fact that the jury has not been advised of the dismissal of the conscious pain and suffering?

THE COURT: You think it wasn't clear enough? What do you think?

MR. ZAWACKI: If the expert testimony wasn't mentioned, then I would say yes, it was clear enough.

THE COURT: All right, then. I'd better mention it.

MR. ZAWACKI: If that's the only thing your Honor would mention at this time after the major charge I would just as soon waive it.

THE COURT: Well, what was crossing my mind was that I didn't want them to put the testimony any higher than it belonged.

MR. SPATT: I do have one more request to charge and that is that the plaintiff has an absolute right to sue the driver of this vehicle even though the driver is the mother and she is the beneficiary of the estate and there is no different duty as to that owed to the child passenger, whether a stranger or her own.

THE COURT: I decline to charge it in that

language so as to highlight that point again.

MR. ZAWACKI: It is my understanding they do not get the exhibits until they're asked for.

THE COURT: Which way do you want to play it?

MR. ZAWACKI: I think it should be that way.

MR. SPATT: I agree.

THE COURT: I will give them three minutes.

MR. SPATT: Do you send them all in?

THE COURT: Yes, on the theory that the last thing you want to do is keep something from a jury when they ask for it.

Of course, in criminal cases they want the FBI reports never in evidence but only for identification. Those, of course, they want right away.

MR. SPATT: What I had in mind is, if they asked for any exhibits would you send them all in?

THE COURT: No, only the ones they ask for. They usually know what they want. They are sometimes perfectly satisfied about everything except one point and that is what they want.

So, start getting all the exhibits in order. Are they all in numerical order?

THE CLERK: Yes, sir, plaintiff and defendant.

THE COURT: So, we are all set up?

THE CLERK: Yes, sir.

THE COURT: All right, bring the jury back.

(The jury entered the jury box.)

THE COURT: There will be no additional charge material, members of the jury, so as soon as we swear the marshals, the marshals will take you into custody and you will commence your deliberations.

(Whereupon two deputy United States marshals were duly sworn by the clerk of the court.)

(Jury excused for deliberations at 3:07 p.m.)

(The following occurred in the absence of the jury.)

THE COURT: Is it all right with you gentlemen if Mr. Walsh gives the exhibits to the jury without summoning you?

MR. SPATT: I will be within ten seconds of this courtroom at all times.

THE COURT: All right.

If we need to have relief marshals sworn, may Mr. Walsh swear them?

MR. SPATT: Absolutely.

THE COURT: Towards dinnertime we get messages and when brought to me, if I am satisfied they are not code, I authorize the marshals to make the calls. The

jury is not permitted to make any calls.

MR. SPATT: Yes, sir, that's fine.

THE COURT: Then of course, as soon as we get any messages from the jury other than requests for exhibits, you will be called and they will be marked as Court exhibits.

MR. SPATT: Will your Honor work until about 5:30 and then resume tomorrow morning, I suppose, at ten o'clock?

THE COURT: Yes, unless they want to start earlier.

(Recess taken.)

(Time noted 3:50 p.m.)

(The following occurred in the absence of the jury.)

THE CLERK: Jury note marked Court Exhibit 1.

(So marked.)

THE COURT: I have a note from the jury requesting photos taken at the scene of the accident and I take it that's been done.

MR. SPATT: Not yet. We want some instruction from you on that.

Some were taken at the time of the accident and some were taken a week later.

THE COURT: I think they are more interested in the scene at the time.

MR. SPATT: Can we inquire about that?

THE COURT: We can. Those taken on the 7th, 8th and 21st?

MR. SPATT: Yes, sir.

THE COURT: Now, the second part of the request is for the judge's instructions.

They give the whole charge to the jury in Indiana but I have never been persuaded to do that here.

MR. ZAWACKI: May we see what they are interested in -- perhaps a word, a paragraph or a page?

THE COURT: Surely.

(Jury enters the jury box at 3:53 p.m.)

THE COURT: You may certainly have all the pictures in evidence if you want them.

Do you want the pictures taken on the day of the accident at the scene of the accident, the pictures taken the next day? There were pictures taken, I think, about two weeks later on the 21st or thereabouts.

JUROR NO. 1: The scene of the accident.

THE COURT: Just at the scene.

JUROR NO. 1: The day of the accident and

immediately before the accident, not a month later.

THE COURT: They are all taken right after the accident. That would be Exhibits 1 through 1F.

Now, are any of the defendant's exhibits -- Defendant's A?

THE CLERK: We have A and 1 through 1F.

THE COURT: Defendant's is Exhibit A?

THE CLERK: Defense counsel suggested this as well (indicating photograph).

THE COURT: Yes.

E is another one and D through D-5 is the next day. That's all I get, isn't it?

MR. SPATT: Yes.

THE COURT: The second part of your request was a request for the judge's charge. Ordinarily, we do not give the charge to the jury, because counsel would prefer that if any question arises about the charge that it be asked in open court so they could know what is troubling the jury and hear how it is answered. Sometimes it calls for nothing but a re-reading of the charge or explanation or such of it.

Do you have any specific question which you would be interested in?

JUROR NO. 2: There was some portion in the

charge referring to three areas of drawing a conclusion -- three elements.

JUROR NO. 3: Relative to the damages.

THE COURT: Well, that's very near the beginning. Pages 8 through 10, I think. The second of these is the one you are really after but the first leads up to it.

Plaintiff's claim is based on allegations of negligence. Negligence is lack of ordinary care. It is the failure to exercise the care that a reasonably prudent person would exercise in the same circumstances. It is doing what a reasonably prudent person would not do, or failing to do what a reasonably prudent person would do, in the same circumstances. A person who is negligent is responsible to those whom it is reasonably foreseeable that his negligent conduct will harm, and he is responsible for the harmful consequences proximately caused by his negligent conduct. His negligence need not be the sole factor in bringing about the harmful consequences, but it must be a substantial factor, that is, it must have had such an effect in producing the accident and injury that reasonable people would regard it as a cause of the accident and injury.

In order to recover, then, plaintiff must bear the burden of proving by a preponderance of the evidence, first, that defendant was negligent; second, that defendant's negligence created a reasonably foreseeable risk of bodily harm to persons in plaintiff's situation -- in this case the plaintiff would always mean the decedent, Julie -- and third, that defendant's negligence was a substantial factor in bringing about plaintiff's accident and injury. If plaintiff fails to prove any one of these three elements by a preponderance of the evidence, then you must bring in a verdict for the defendant. If plaintiff does prove each of these three elements by a preponderance of the evidence, then you must return a verdict in favor of plaintiff.

Okay?

(Jurors nod affirmatively.)

(Jury excused at 4:00 p.m.)

(The following occurred in the absence of the jury.)

MR. ZAWACKI: May the record reflect that although the question was not specifically asked by the Court to the effect "Are you satisfied with what I have just read," all of the jurors, I saw, indicated by nodding their heads or other signals that they were

satisfied.

THE COURT: That is what I understood and why I stopped where I did.

MR. SPATT: In re-reading this part of the charge --

THE COURT: Which you have had for a week --

MR. SPATT: Yes, I have -- I think with respect to item second, that it might be clarified more to the jury in the interest of justice in that the second item reads: That defendant's negligence created a reasonably foreseeable risk of bodily harm to persons in plaintiff's situation.

I now think -- and I should have done it before -- that you should make an explanation that that means it refers to a passenger.

THE COURT: I did. I said that means Julie.

MR. SPATT: I think that a further explanation of that element -- I think that's what is troublesome to the jury. I noticed some of the jurors leaned forward when we came to the second element and in more simple language it should say "Did it endanger the passenger."

THE COURT: I said, that means Julie -- where it says "plaintiff" here that means Julie. That is

what I told them. Would that be plain enough?

MR. SPATT: I think the second item should be rephrased and given to the jury differently in the interest of justice.

THE COURT: Bring the jury back.

MR. ZAWACKI: Now, if you call the jury back and if you call attention to a particular part of it, Judge, I don't know what they will do.

It has been given to them twice and to pick this part out and read this part back to them I don't think is necessary.

THE COURT: I don't see how they could have thought otherwise, but if there is any risk of it we have to eliminate it.

(Jury entered the jury box, at 4:05 p.m.)

THE COURT: In reading the first, second and third part to you, the view has been expressed here that there might be some uncertainty as to what is meant by "defendant's negligence created a reasonably foreseeable risk of bodily harm to persons in plaintiff's situation."

Now, the person referred to is Julie Weiner, who was a passenger in the car driven by Mrs. Weiner.

So, what we are talking about there is that

defendant's negligence -- if you find it, of course -- created a reasonably foreseeable risk of bodily harm to the passenger in the vehicle she was driving.

So, that would read then that in order to recover plaintiff, Julie Weiner's administratrix, must bear the burden of proving by a preponderance of the evidence first, that defendant was negligent, second, that defendant's negligence created a reasonably foreseeable risk of bodily harm to persons in Julie Weiner's, Alan Vance Weiner's and Louie Weiner's situation, and third, that defendant's negligence was a substantial factor in bringing about plaintiff's accident and injury, herein sued for, and that is, Julie Weiner's death.

Clear?

JUROR NO. 1: Yes.

THE COURT: If plaintiff fails to prove any one of these three elements by a preponderance of the evidence, then you must bring in a verdict for defendant. If plaintiff does prove each of these three elements by a preponderance of the evidence, then you must return a verdict in favor of plaintiff.

(Jury excused at 4:10 p.m. for further deliberations.)

(The following occurred in the absence of the jury.)

MR. ZAWACKI: I want to take exception to that additional charge.

THE COURT: Yes.

(Recess taken.)

(Time noted: 4:25 p.m.; the following occurred in the absence of the jury.)

THE COURT: I have a note here saying they want tea.

DEPUTY U.S. MARSHAL: The foreman announced it orally but I asked him to do it in writing.

THE COURT: Can it be done?

THE CLERK: There is a vending machine downstairs.

THE COURT: All right.

MR. SPATT: I am very apologetic, but looking over the charge again and on this question of foreseeability --

THE COURT: You know, this is absolutely beyond belief but proceed.

MR. SPATT: It is my fault and I apologize, but I don't think foreseeability has any place --

THE COURT: I do

MR. SPATT: If your Honor please, I have been looking at the request to charge on foreseeability and there is not one automobile case. It has never been charged. I looked at it and it just escaped me --

THE COURT: You have had that for over a week.

MR. SPATT: But it is a mistake and I think in the interest of justice --

THE COURT: It is not a mistake. It is in there because it belongs there and your request is denied.

MR. SPATT: I am asking --

THE COURT: I understand what you are asking.

MR. SPATT: The second element.

THE COURT: Yes.

MR. SPATT: Page 10.

THE COURT: Yes, I understand.

(Recess taken.)

(Jury entered the jury box at 5:30 p.m.)

THE COURT: Members of the jury, I infer that you have not reached a verdict and you are not yet at the point where you were about to tell us that you had reached a verdict; is that right?

JUROR NO. 1: Yes.

THE COURT: Well, the practice in this court is that at about this time the jury is excused for

the day, allowed to separate and go home and return and resume deliberations in the morning.

I should say to you that this is an innovation in our jury law because for many centuries until quite recently, once a jury was sworn in the beginning of the case they were not allowed to separate until a verdict was reached and legend has it that quite cruel things were done to jurors until a verdict was wrung out of them.

Well, we felt that was quite undesirable and they should not be subject to unnatural situations and hence, we will excuse you at the close of a long business day and allow you to go home.

Now, it must be manifest to you that you have the trust of this Court and you must not betray that trust. No one else in this room, only you and you alone, are competent to decide this case and only you have heard nothing except sworn testimony and have seen exhibits which all agree are receivable in evidence. Only you are under an oath to decide the case and were chosen to decide the case because you had no interest on either side and no bias on either side.

Now, it must be apparent to you that your position is totally unique and you are the body corporately charged and uniquely charged with the responsibility

to determine the issues in this case. Hence, when you separate it is absolutely imperative that you not discuss this case in any way with anyone not on the jury. You do not turn at a time like this to your most trusted friend and adviser, your spouse, and above all, you do not turn to people in whom you have confidence because they cannot possibly help you in this. Only you are qualified to decide this case or advise on this case, no one else.

Again, when you do convene or reconvene in the morning, please wait until you are all together, because if you start discussing it when only some of you are present, as sure as shooting, something is going to be said that might have been very important for another juror to hear who will never hear it, and thus, wonder why you are off where you are on your pattern of thinking. So, all your deliberations should be shared. So, if you drive home together or anything like that, please do not discuss the case because whatever discussions you have should be where all of you have the opportunity to have access to it.

Now, under this injunction we will separate until tomorrow. Do not check in downstairs tomorrow. Mr. Walsh will take care of that physical necessity.

Come directly to the jury room and resume your deliberations.

JUROR NO. 2: What time?

THE COURT: Ten o'clock. And could you give Mr. Walsh or the marshals the exhibits and they will put them in this envelope and they will be returned first thing when you come in tomorrow morning.

(Jury excused for the day at 5:30 p.m.)

(The following occurred in the absence of the jury.)

MR. ZAWACKI: I don't know if I can come back tomorrow morning. Can I get a substitute lawyer?

THE COURT: Yes.

MR. ZAWACKI: If not, I will be in a building close by.

THE COURT: You make sure our clerk has some means of getting hold of you pretty quick.

THE CLERK: Will the plaintiff's lawyer be on time?

MR. SPATT: Yes, with bells on.

(Whereupon court was adjourned until October 3, 1974.)

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

ALAN VANCE WEINER,

Plaintiff,

-against- 71 C 1177

BARBARA WEINER,

Defendant.

----------x

United States Courthouse
Brooklyn, New York

October 3, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

ILENE GINSBERG
OFFICIAL COURT REPORTER

Appearances:

ARTHUR D. SPATT, ESQ.,
Attorney for Plaintiff.

STANLEY ZAWACKI, ESQ.,
Attorney for Defendant.

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THE CLERK: Court Exhibit 3 Jury note marked.

Court Exhibit 4, jury note marked.

(At 2:25 p.m., out of hearing of the jury.)

THE COURT: We have a note which states we cannot reach a unanimous verdict.

I gave you pages of a very dilute -- Alan charge.

We can do a couple of things.

In a case of this kind in which the ascertainment of damages is obviously fantastically difficult, it is less possible that the jury has fallen apart on damages and nothing else.

So we might inquire.

Perhaps it is our duty to inquire.

The second thing in consideration is that we might, and as you know, the Federal Rules encourage us to ask counsel whether they will accept a verdict of five and six of the jury.

I don't know whether it sticks at five and six.

Now, I do not find anything in the Rule now.

We can do it, I know, because it has been done repeatedly and our Chief Judge Kaufman, as you know has taken a great deal of interest in jury trials in Federal Courts and has suggested we ought to try that all the time.

Let me tell you a story; There was a triple damages matter in which United Fruit was defended against a charge of monopolizing the trafficking of bananas out in South America and I think the plaintiff was General Banana Company and the jury went out and they finally reached the point of our Court Exhibit 5, so the Judge got counsel in and said the jury cannot agree and he got their permission to ask whether they were divided near the middle and he did and they said, no, we are divided eleven to one; so then he said to counsel, well, you want to take an eleven man verdict and plaintiff said I sure do, Judge, and a Mr. Chandler and a Mr. Kimball representing United Fruit Company naturally said, Oh, no, and when the jury came in the Judge said just a matter of curiosity, which way were you split and they said, Oh, eleven to one for the defendant. When the case was retried, I don't know if you remember, but United Fruit really lost tremendously; so you cannot assume from the fact that there is a degree that is one way or the other.

The chances in this case is they are split down the middle. It is a difficult guess.

MR. ZAWACKI: I would have no objection to you following the United Fruit rule and asking this jury if they are split, near the middle, and that might give

3 us a clue where we go next.

THE COURT: Shall I give them the Alan Charge first or what?

MR. SPATT: My own personal opinion is that, if your Honor is going to ask something about a split one way or the other we should make up our minds now whether we will consider now a five-six verdict without finding out anything from the jury.

THE COURT: You don't want to ask the question until you know that waiver in the rule -- well, you see, if they are not all, if they are split at the middle, then I think if I grasp your thought, you will try it on a five-six basis.

MR. ZAWACKI: I am only willing to entice them in this manner: I would like a verdict in the case. There has been a lot of time put in here.

MR. SPATT: I don't know how I would feel about any five-six verdict. My initial verdict is that I would not go along with it, Judge.

THE COURT: No matter what you find in the corridor later?

MR. SPATT: Yes.

THE COURT: Let me ask them, if you wish, I could give them the Alan Charge first and if they indicate they don't think further deliberation will

help, I can then ask them whether they have agreed on any issue in the case, for example, have they agreed on the issue of negligence or liability, because if they have, isn't it our duty to take that or can we say, no.

This is the kind of case in which I think the two issues are radically separable. There are some cases in which damages and liability are so inexorably tied up that you have a feeling that one cannot be decided without the other. I don't think this sort of case is that type.

MR. SPATT: My own feeling is that they are probably tied up on the question of liability because if they got past that question I personally thought they would have done like any other Judge has done with far more difficult questions of damages and arrive in the way they generally do on damages.

My impression is that they are tied up on the question of liability and with that in mind I do not know how your Honor feels about this Alan Charge type of thing. I have not had too much experience with it but this trialhas only taken two and a half days of testimony or maybe a little more. They have been deliberating now for six hours.

I personally think if they haven't reached a

verdict and they seem to be fairly intelligent jurors, and they know what they want, pursuing it further would not be fruitful. That is my own feeling in the matter.

You have the right to do what you want to do.

THE COURT: I have a feeling that sometime jurors are not in agreement and you take them out in the courtroom and you take a fresh look at it and they hear a few additional words sometimes they can back and go at it.

At the moment disagreement is at the head of the matter.

I loathe a retrial.

I think after that, instead of getting testimony by real people you get a maximum effort of remembering what I said the last time.

I don't try coercion. Don't worry about that. That does not make any sense. I don't think you can coerce twelve Americans. I think that just gets their dander up, at least I hope so.

(The jury entered the courtroom at 2:35 p.m.)

THE COURT: We have your message, members of the jury, reading we cannot reach a unanimous decision.

It is attributed to the care and attention which you are giving to the case.

Before I acquiesce in your better judgment, I want to suggest a few thoughts which you may wish to consider.

If you resume deliberation along with all the evidence and all the instructions previously given here, and now this trial has not in terms of trial days, been going that long, it has been about eight hours; but as you can judge it has not been without expense and money and in human effort to the parties.

If you fail to agree on the verdict the case is left opened and undecided.

There appears to be no reason to believe that the case will be tried better or more exhaustably at a future date than it has been now.

The future jury must be selected in the same manner and from the same sources as you have been chosen. There is no reason to believe that the case can ever be submitted to twelve men and women more intelligent, more impartially chosen or more confident to decide it, or that a different counterpoise of evidence will be produced on behalf of either side.

Now, these are obvious matters but they remain with us and that is the task before us and it is one of conscientious decision which you are equipped to make.

7 A juror must not surrender his or her conscientious conviction.

However, it is your duty as jurors to consult with one another and deliberate with a view toward reaching agreement, if you can do so, without violence to individual judgment.

Each of you must decide the case for yourselves, but a part of that process of individual decision is a consideration of the evidence and of the views of your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views and change your opinion, if convinced, it is erroneous.

You must examine the question submitted to you with candor and frankness and with proper consideration for one another's opinions. Each of you should give attention to and with respect to the views of the others and listen to each other's arguments with a disposition to keep your own views under continuing review.

Each juror ought to consider whether her or his own appraisal of the weight of the evidence is a correct one; if he or she finds that it is an effective impression upon one or another of his or her equally disinterested fellow jurors who bear the same responsibility

and serve under the sanction of the same oath and have heard the same evidence.

Now, I cannot and should not know the course of your deliberations.

What I am saying, maybe ill-suited to deal with the differences that have thus far prevented you from agreeing. In the performance of your high duty you are at liberty to disregard all comments of both Court and counsel, including, of course, these remarks that I am now making, but I would like to ask you to resume your deliberations and remind you nevertheless that no juror must yield a conscientious conviction he or she may have as to the weight or effect of evidence.

Would you be prepared to resume deliberations for such time as your good conscientious judgment suggests is reasonable?

(The jury nodded in the affirmative.)

THE COURT: Thank you.

(The jury withdrew from the courtroom at 2:42 p.m.)

(Continued on next page)

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LH 1 1 (After recess.)

(Time noted 5:50 p.m.)

(The following occurred in the absence of the jury.)

THE COURT: The jury says it has reached a verdict.

THE CLERK: Note marked as Court Exhibit No. 6.

(So marked.)

(Jury entered jury box at 5:50 p.m.)

THE COURT: We have your message that you have reached a verdict.

THE CLERK: Mr. Foreman and ladies and gentlemen of the jury do you find for the plaintiff Audrey Weiner as Administratrix of the Estate of Julie A. Weiner, deceased or do you find for the defendant, Barbara Weiner?

JUROR NO. 1: We find for the defendant.

THE CLERK: You say you find for the defendant Barbara Weiner and so say you all.

MR. SPATT: I would like the jury individually polled.

THE CLERK: Mr. Foreman and ladies and gentlemen of the jury you have heard your verdict as the Court has received it, finding for the defendant Barbara Weiner.

Juror No. 1, is that your verdict?

JUROR NO. 1: Yes, it is.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes, it is.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes, it is.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes, it is.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5; Yes, it is.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes, it is.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes, it is.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes, it is.

THE CLERK: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes, it is.

THE CLERK: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes, it is.

THE CLERK: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes, it is.

THE CLERK: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes, it is.

THE CLERK: The jury is polled, your Honor.

THE COURT: That completes your services jurors

3 in this case and completes your service at this term of court.

On behalf of counsel, the other Judges of the Court, counsel in all the cases, I want to thank you all for your services Jurors and I should say to you that all of us here and Mr. Spatt, not less than I, would not give up the jury system for anything in the world. All of us who work in courts after a while come to believe in the jury system and we know we impose upon you and try your patience almost beyond endurance. We also know we cannot do without you. As far as we are concerned you are the keystone in the arch of justice. When you hear people talking about abolishing juries and they tell you what wonderful students of the law they are, you can be quite sure they are not trial lawyers nor judges because those of us who are do not mean to have the jury taken away from us.

If you have suggestions to make to us about improving the jury system in spite of its great age, please do write us even if you feel we must have heard it a dozen times -- even things about serving the convenience of the jurors. You can be sure they will be taken seriously. The only suggestion we will not take seriously is that the system be abolished.

I know it must seem to you that the whole system

4 is terribly inefficient. We must have 30 or 40 people up here and then you saw the rest chased downstairs and you were waiting, heaven knows how long before you came up here, but that was because we weren't ready to go and we did keep you waiting while we argued, but everyone of these things we explained to you and I think we have satisfied you.

It is just inseparable in trying to get fair juries fairly selected and having adequate enough challenges to be able to freely inquire so that in the end you have the jury you want.

If anyone needs his certificate of attendance Mr. Walsh will supply you with one.

MR. ZAWACKI: I wish to thank the jury.

MR. SPATT: I wish to agree with Judge Dooling.

I most respectfully disagree with the juries verdict but I agree with Judge Dooling as to the abolishment of the jury system.

(Jury discharged at 6:00 p.m.)

MR. SPATT: I have a motion to make.

I respectfully move to set aside the verdict of the jury and I would like to have an opportunity to do this on papers because I think it is a valid rather than a perfunctory motion in this case.

THE COURT: There is a time problem. Let's get

our heads clear on that.

Motion for judgment notwithstanding the verdict must be made within ten days and a motion under Rule 59 must also be made not later than ten days.

MR. SPATT: Is that the one to set aside the verdict?

THE COURT: Motion for a new trial, yes.

I think you had better look at the rules because you have to be a little bit specific.

MR. SPATT: Would it be proper to make an oral motion now?

THE COURT: I think you'd be better off looking at the rules because it can be a little tricky.

MR. SPATT: Can I reserve my right to make such motions.

THE COURT: Oh, yes.

MR. SPATT: That is, the motion to set aside the verdict as against the weight of the credible evidence and all those things.

THE COURT: Yes, as well as motions for direction under 1126A for example or under Coury.

MR. SPATT: Thank you very much, your Honor.

THE COURT: Thank you very much, Gentlemen.

A very difficult and awkward case for both of you.

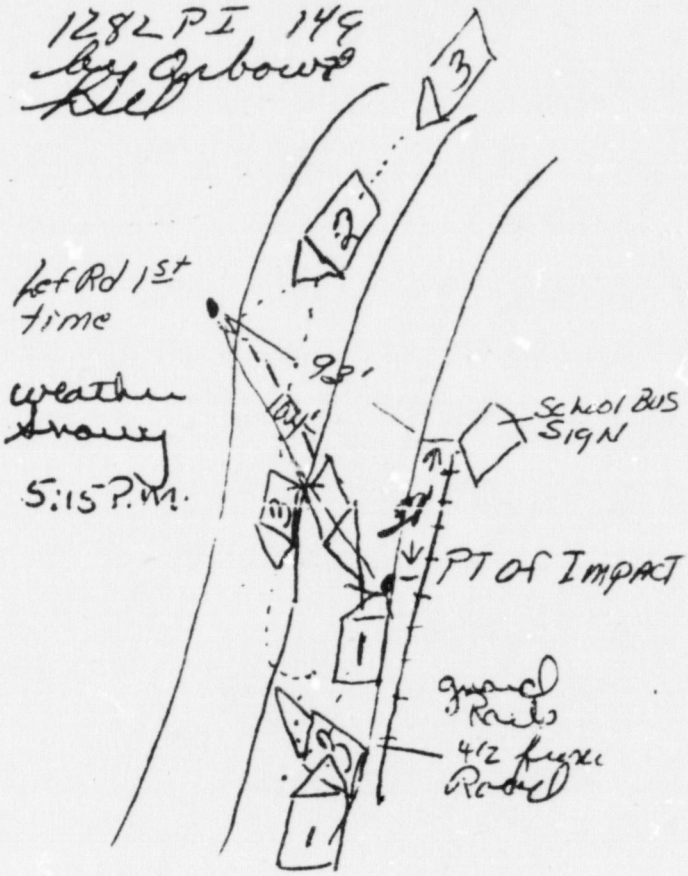
(Whereupon Court was adjourned at 6:05 P.M.)

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PLAINTIFF'S EXHIBIT 2

3-1-71 40 mile

1282 PI 149
by Gribou
Rec

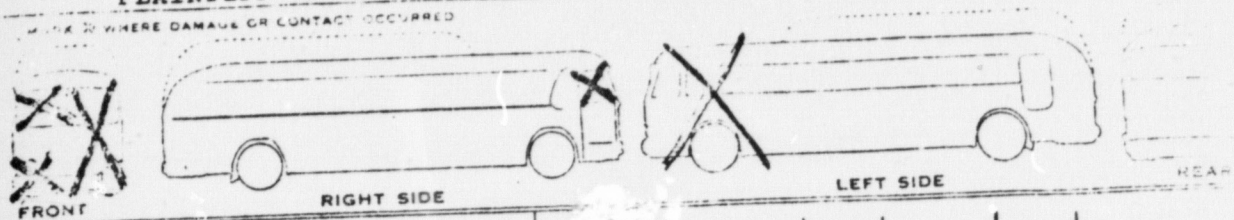



Bus Pushed Back 8' to 10'
Width of road 20'
Shoulders 4½' to guard Rails

Exh 2 Pltf
Offer Diagram #1

# PLAINTIFF'S EXH. 10--DEFT. GREYHOUND'S DRIVER REPORT

MARK X WHERE DAMAGE OR CONTACT OCCURRED

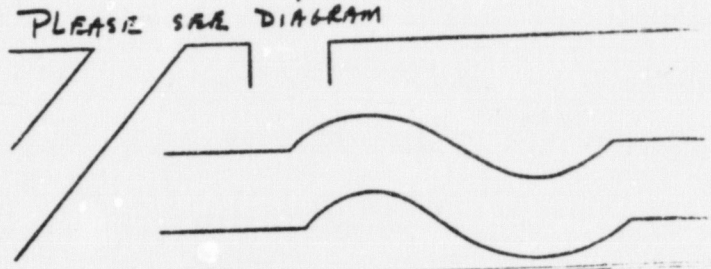



**INSTRUCTIONS**

1. Choose sections of diagram that will show outline of roadway at place of accident.
2. Use solid line to show path of vehicle BEFORE accident: ——→ BUS
   dotted line AFTER accident: - - - - → BUS
3. Number each vehicle and show direction of travel by arrow: → BUS ← 2
4. Show PEDESTRIAN by: o
5. Show RAILROAD by: +++++ *
6. Show TRAFFIC LIGHT by:
7. Show STOP SIGN by: ◇
8. Indicate distance and direction from point of impact to nearest bridge, culvert, or other landmarks.
9. Indicate names of streets or route numbers of roadways.

INDICATE NORTH WITH AN ARROW

PLEASE SEE DIAGRAM



| TRAFFIC LANES | ROADWAY | SIGNALS | PAVING | WEATHER | LIGHT |
|---|---|---|---|---|---|
| NO. OF LANES: 2 | ☒ LANES MARKED. ☐ LANES UNMARKED. | ☐ STOP SIGN. ☐ TRAFFIC LIGHT. ☐ POLICEMAN. ☐ WARNING SIGNAL. ☐ R. R. GATES. ☐ ____ (OTHER) | ☐ CEMENT. ☐ TARVIA. ☐ BRICK. ☒ ASPHALT. ☐ GRAVEL. ☐ NONE. | ☒ CLEAR. ☐ RAIN. ☐ SNOW. ☐ SLEET. ☐ FOG. ☐ ____ (OTHER) | ☒ DAYLIGHT ☐ DARK. ☐ DUSK ☐ DAWN |
| WIDTH OF EACH: 10 FT | ☒ NO ROAD DEFECTS. ☐ HOLES. RUTS. ETC. ☐ LOOSE MATERIAL. | ☐ WORKING. ☐ NOT WORKING. | LOCATION: ☐ CITY & SUBURBAN ☒ RURAL | LOCATION: ☐ INTERSECTION. ☒ NON-INTERSEC. | IF DARK, WAS HIGHWAY LIGHTED? ☐ YES ☐ NO |
| ☐ DIVIDED. ☐ ____ (OTHER) | ☐ ____ (OTHER) | | | | |
| | ROADWAY: ☐ STRAIGHT. ☐ CURVE. ☐ DOWN GRADE. ☒ UP GRADE. ☐ LEVEL. ☐ HILLCREST. ☐ DRY. ☒ WET. ☐ MUDDY. ☒ SNOWY. ☐ ICY. ☐ OILY. | | | | |
| | FLAGS. FLARES. FUSEES ETC. DISPLAYED: YES | | | | |

| | LOCATION ON ROADWAY WHEN DANGER NOTICED | Direction Traveling | DISTANCE TO IMPACT | LOCATION ON ROADWAY AT IMPACT | DISTANCE TRAV AFTER IMPACT | LENGTH OF SKID MARKS |
|---|---|---|---|---|---|---|
| BUS | IN DRIVING LANE | WEST | UNKNOWN FT. | HALF SHOULDER/HALF DR. LANE | PUSHED BACK 6-8 FT. | NONE |
| OTHER VEH. | TOP OF HILL | EAST | | IN WEST BOUND LANE | ~~S~~ FT. | |

DESCRIBE ACCIDENT FULLY (CONTINUE ON ADDITIONAL SHEET IF REQUIRED)

DRIVING WEST ON 149, OBSERVED TWO CARS COMING DOWN HILL. FIRST OF TWO CARS HIT GUARD RAILS ON RIGHT SIDE OF ROAD. AS SOON AS I NOTICED THE DANGER I APPLIED BRAKES. THEY WERE APPLIED ALL THE TIME FROM WHEN SHE HIT GUARD RAILS UNTIL THE TIME OF IMPACT. SHE LOST CONTROL OF THE CAR AND IT CAME ACROSS INTO THE WEST LANE. AT THIS TIME I HAD DONE EVERYTHING POSSIBLE TO GET THE BUS AS FAR AS POSSIBLE OVER TO THE RIGHT. THE CAR HIT THE BUS HEAD ON. AT THE TIME OF IMPACT I HAD ALMOST COMPLETELY STOPPED THE BUS. AT NO TIME DID THE BUS SKID, NOR DID I EVER LOSE COMPLETE CONTROL. THERE WAS JUST NO PLACE TO GO.

SUPERVISORY OFFICER: D. C. Hamrick

DRIVER'S SIGNATURE: Donald Hill Jones

DATE OF REPORT: 3/9/70

PAGE 2

~~Exhibit~~ Page 2

PX Exh 10

Driver's Report

STATE OF NEW YORK )
: SS.
COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of August, 1975 deponent served the within Appendix upon REILLY & REILLY; SCHWARTZ, LEVITT, SOMMER & BLITZ and JOHN S. & ZACHARY

attorney(s) for Appellees

in this action, at 233 Broadway, NYC 10007, 50 Court St., Brooklyn, N.Y. and 75 Little Clove Rd., Staten Island, N.Y, respectively

the address(es) designated by said attorney(s) for that purpose by depositing 1 X true copies of same enclosed in a postpaid property addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robt Bailey
.....
ROBERT BAILEY

Sworn to before me, this
12th day of August, 1975.

WILLIAM B. [illegible]
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976